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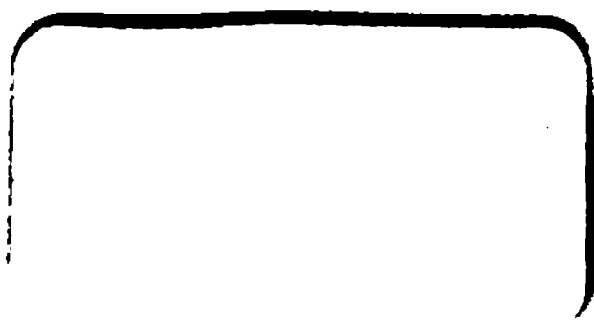
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REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

Circuit Court of the United States

FOR THE SECOND CIRCUIT.

BY SAMUEL BLATCHFORD,

JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN
DISTRICT OF NEW YORK.

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J U D G E S
OF THE CIRCUIT COURTS OF THE UNITED STATES
WITHIN THE SECOND CIRCUIT,
D U R I N G T H E T I M E O F T H E S E R E P O R T S .

**SAMUEL NELSON, Associate Justice of the Supreme
Court of the United States.**

DISTRICT JUDGES.

**SAMUEL BLATCHFORD, Southern District of New
York.**

NATHAN K. HALL, Northern District of New York.

**CHARLES L. BENEDICT, Eastern District of New
York.**

DAVID A. SMALLEY, Vermont.

WILLIAM D. SHIPMAN, Connecticut.

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CASES
ARGUED AND DETERMINED
IN THE
CIRCUIT COURTS OF THE UNITED STATES
WITHIN THE SECOND CIRCUIT.

THE SANTEE.

The fact that the claimant in a suit, *in rem*, for a collision, by putting repairs on the libellant's vessel, before suit was brought, made her worth more than she was worth before the collision, furnishes no reason for refusing to the libellant a recovery for demurrage, for the time occupied in making such repairs.

(Before NELSON, J., Eastern District of New York, November 26th, 1867.)

THIS was a libel, *in rem*, filed in the District Court, in a case of collision. The claimants had repaired the damage done to the libellant's vessel, but refused to pay any demurrage, for the time occupied in making repairs, and the libel was filed to recover such demurrage. The District Court decreed for the libellant, and the claimants appealed to this Court. The ground taken, on the appeal, was, that no demurrage ought to be recovered, for the reason that, by the repairs, the vessel had been made worth more than she was worth before the collision.

THE COURT held, that the ground taken furnished no reason for reversing the decree below, and that it must be affirmed.

The Syracuse.

THE SYRACUSE.

A contract by a steamer to tow a canal boat, at the risk of the canal boat, does not exempt the steamboat from liability for damages caused to the canal boat by the negligence of those in charge of the steamboat.

Where a steamboat, with thirty-five boats in tow, is endeavoring to pass around the Battery, at New York, from the North river into the East river, she should, if the harbor is crowded with vessels at anchor, pass around Governor's Island, and come up into the East river through Buttermilk channel.

(Before NELSON, J., Southern District of New York, November 27th, 1867.)

THIS was a libel, *in rem*, filed in the District Court, against the steamboat Syracuse, by the owner of a canal boat that was being towed by her from Albany to New York, to recover for the damages sustained by the canal boat, by her coming in contact, while so being towed, with a brig which was at anchor near the Battery, at New York. The District Court decreed for the libellant, and the claimant appealed to this Court.

James C. Carter, for the libellant.

Robert D. Benedict, for the claimant.

NELSON, J. One ground of defence set up is, that, by the contract of towage, it was agreed that the canal boat was to be towed by the steamer at her own risk. The answer to this is, that this contract does not exempt the steamboat from liability for damages caused to the canal boat by the negligence of those in charge of the steamboat.

On the question of negligence, the Court below decided against the steamboat, in accordance, I think, with the weight of the evidence. The steamboat was making the circuit to get into the East river, the tide being ebb. The weight of the proof is, that there was room sufficient, with the exercise

The Bridgeport.

of proper caution and care, to make the turn with safety, and avoid vessels at anchor. Besides, even conceding the crowded condition of the harbor, the steamboat should have followed the precaution of one which, with as large a tow, thirty-five boats, had gone down just ahead of her, and, to avoid danger, had passed around Governor's Island, and come up into the East river through Buttermilk channel.

Decree affirmed.

THE BRIDGEPORT.

Where a schooner was beating, with a flood tide, through the channel between Blackwell's Island and the New York shore, and was on her starboard tack, on her way from the island to the New York shore, and a steamer behind her, going in the same direction, at a speed of eight knots an hour, blew a whistle, as a signal to the schooner to tack short, and not to run out her course, and to permit the steamer to pass between her and the New York shore, and the schooner ran out her course before she tacked, and a collision ensued, and there was room for the steamer to have passed to the east of the schooner, and, if the schooner had tacked short, there would have been danger of her colliding with another schooner: *Held*, that the schooner was right in running out her course, and that the steamer was in fault.

(Before NELSON, J., Southern District of New York, November 29th, 1867.)

THIS was a libel, *in rem*, filed in the District Court, against the steamer Bridgeport, to recover for the damages sustained by a schooner, in a collision between the two vessels, which occurred on the 12th of September, 1864, between one and two o'clock P. M., in the channel which separates Blackwell's Island from the New York shore, near the head of the island. The schooner was on her starboard tack, on her way from the island to the New York shore, and had just run out the tack, and had commenced preparing for the other tack, toward Hell Gate, when the collision took place. The District Court decreed for the libellants, and the claimants appealed to this Court.

The Bridgeport.

Charles Donohue, for the libellants.

Edward H. Owen, for the claimants.

NELSON, J. There is no dispute about the facts in this case, nor any question but that both vessels had seen each other when two or three miles apart, both passing through the channel, in the same direction, the schooner in advance, beating through against the wind, and the steamer coming up under a headway of some eight knots the hour, with the flood tide.

The only controversy, is, whether, under the circumstances existing at the time, the schooner should have kept out of the way of the steamer, or the reverse. The steamer insists that she was entitled to go up along the New York shore, and that the schooner should have tacked before running out her course, and thus have provided a free way for the course of the steamer. This the schooner refused to do.

The channel is nearly half a mile wide, and it is clear that the steamer could have found room to pass up east of the schooner. It is impossible to account for the neglect of the master to take this course, except on the ground taken by him in his testimony, that, on his blowing his whistle, it was the duty of the schooner to stop and tack, without running out her course, and leave room for the steamer to pass up along the New York shore. I think that the schooner was right in running out her course, for, if she had omitted to do so, and an accident had happened on this account, she might have been responsible for it. The master of the steamer should have assumed that the schooner would fulfill her duty in this respect, and should have navigated his vessel accordingly, and not undertaken to change the rule for this special occasion.

It is due to the schooner to state, that, on account of the approach of another schooner, it would have been difficult for her to tack short without danger of a collision.

Decree affirmed.

Merriam v. Clinch.

ELA N. MERRIAM, ADMINISTRATOR, &C., OF PRESTON KING,
DECEASED,

v8.

CHARLES P. CLINCH. IN EQUITY.

Under the 22d section of the Act of March 2d, 1799, (1 *U. S. Stat. at Large*, 644,) where the deputy of a collector of the customs acts for the collector, in cases of occasional and necessary absence and of sickness, the collector still acts, but acts by the deputy, and is entitled to all the perquisites and emoluments of the office; but, where the collector is disabled or dies, the duties and authorities vested in him devolve on the deputy, and the perquisites and emoluments which accrue to the office of collector, after such disability or death, do not belong to the collector, or to his estate.

No officer is entitled to the emoluments of an office for any longer period than the period during which he holds the office.

The provisions of the statutes of the United States on that subject, cited.

The right to the compensation attached to an office grows out of the discharge of the duties of such office, and its emoluments do not belong to a person who does not discharge its duties.

(Before BLATCHFORD, J., Southern District of New York, December 14th, 1867.)

THIS was a final hearing, on pleadings and proofs, of a suit originally brought in a State Court, and removed into this Court by *certiorari*. Preston King, while holding the office of collector of customs for the district of the city of New York, died, on the 13th of November, 1865, at said city, intestate. The plaintiff was appointed his administrator, on the 25th of November, 1865, by the Surrogate of St. Lawrence county, New York. Mr. King became such collector on the 1st of September, 1865. On the 22d of September, 1865, Mr. King, by an instrument in writing executed by him, under his hand and official seal, appointed the defendant "Special Deputy Collector of the Customs." The material parts of that instrument were in these words: "District of the City of New York. To Charles P. Clinch. By virtue of

Merriam v. Clinch.

the powers vested in me by the 22d section of the Act of March 2d, 1799, chapter 28, and in pursuance of the Treasury Circular of February 1st, 1850, appended to the Treasury Circular of April 3d, 1842, I hereby constitute and appoint you Special Deputy Collector of the Customs, within this district, to act for me during my absence or sickness, and, in case of my disability or death, the duties and authorities vested in me as collector will, by law, devolve on you, my special deputy." From the time of the death of Mr. King until the 16th of May, 1866, the defendant acted as collector of customs for said district, under said appointment as special deputy. During that time, large sums of money accrued and became due and payable, for the salary of the collector of customs of said district, and for fines, penalties, and forfeitures. The plaintiff claimed that these sums pertained, as perquisites of office, to such collector, and came into the hands of the defendant in a fiduciary capacity, as the servant, agent, and special deputy of Mr. King. He averred that the defendant claimed to hold and retain such sums in his own right, and refused to account for them, or pay them over to the plaintiff. The prayer of the bill was, in substance, that the defendant pay over to the plaintiff all such moneys as had come into the hands of the defendant, as such servant, agent, and special deputy of Mr. King, as such collector, on account of the salary of the collector of said district, and on account of the share of fines, penalties, and forfeitures, and other perquisites of office, pertaining to said office, accruing or arising between November 13th, 1865, and May 16th, 1866.

The defendant, prior to his said appointment as special deputy, was appointed assistant collector of customs at the port of New York, under section 16 of the Act of March 3d, 1863, (12 *U. S. Stat. at Large*, 753,) and, from the time of his said appointment as such assistant collector, until the 16th of May, 1866, he received and retained a salary as such assistant collector, at the rate fixed by law for that office, \$5,000 per annum, and, in addition, he received and retained, from the 13th of November, 1865, to the 16th of May, 1866, the full

Merriam v. Clinch.

salary allowed by law to the collector, and the share of fines, penalties, and forfeitures allowed by law to the collector.

E. G. Ryan and Charles G. Myers, for the plaintiff.

Thomas Simons (Assistant District Attorney) and Nelson K. Wheeler, for the defendant.

BLATCHFORD, J. The question involved in this case arises under the 22d section of the Act of March 2d, 1799, (1 *U. S. Stat. at Large*, 644.) That section provides, that "every collector, * * * in cases of occasional and necessary absence and of sickness, and not otherwise, may * * * exercise and perform" his "functions, powers, and duties, by deputy, duly constituted" under his hand and seal, "for whom, in the execution of his trust," he "shall be answerable;" and "that, in case of the disability or death of a collector, the duties and authorities vested in him shall devolve on his deputy, if any there be, at the time of such disability or death, for whose conduct the estate of such disabled or deceased collector shall be liable." The section provides for two classes of cases in which the collector is unable to discharge himself the duties of his office. The first class is where the collector is necessarily occasionally absent, or is sick. The second class is where the collector is disabled or dead. In the first class of cases, the collector does not cease to exercise or perform the functions, powers, or duties of his office. On the contrary, by the express language of the section, he continues to exercise and perform such functions, powers, and duties, but he exercises and performs them by his deputy. Such deputy must be duly constituted such deputy under the hand and seal of the collector, and the collector is made answerable for the execution, by such deputy, of his trust. In the second class of cases, that is, the disability or death of the collector, the duties and authorities vested in him devolve on his deputy, if there be one at the time of such disability or death, that is, on the

Merriam v. Clinch.

deputy whom the section thus authorizes him to constitute; and the estate of such disabled or deceased collector is made liable for the conduct of such deputy. In the second class of cases, if there be a deputy, the collector does not continue to exercise and perform the functions, powers, and duties of the office by the deputy, but the duties and authorities before vested in the collector devolve on the deputy; and, in such second class of cases, if there be no deputy, then, by a provision in the same section, the duties and authorities before vested in the collector devolve on the naval officer of the the same district, if any there be, and, if there be no naval officer, then on the surveyor of the port, if any there be, and, if there be none, then on the surveyor of the nearest port in the district. The section also provides, that the authorities of the person empowered to act in the stead of a disabled or dead collector shall continue until a successor to such collector shall be duly appointed and ready to enter upon the execution of his office. If, under this section, there is no person empowered to act in the stead of the disabled or dead collector, then the duties and authorities before vested in the collector do not devolve on any one.

Now, where a deputy, constituted under this law, acts for the collector, in cases of occasional and necessary absence and of sickness, the collector still acts, but acts by the deputy, and is entitled to all the perquisites and emoluments of the office, as fully, while so acting by deputy, as if he did not so act by deputy. But, when the collector is disabled or dies, then the duties and authorities vested in him devolve on the deputy thus constituted. The collector, in such case, whether he be disabled or dead, does not exercise or perform his functions, powers, and duties, by such deputy, nor does he act by such deputy, nor is he entitled to the perquisites and emoluments of the office, which he would have been entitled to, if he had not become disabled or had not died. The duties and authorities of the office devolve on such deputy, if there be one, and, if there be none, then on the other officers successively, who are designated in the section. The

Merriam v. Clinch.

word "authorities" is broad enough to include the emoluments of the office. The "duties" of the office include the obligations which the officer owes to superior authority and to the public. The "authorities" of the office are the powers and prerogatives with which the office is clothed, connected with the discharge of his duties, including, not only such powers as are necessary to enable him to discharge his duties properly, but the right and the power to demand and receive the emoluments attached by law to the office.

These views accord with settled principles. The Constitution of the United States (*Article 2, section 6*) provides, that "in case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice President." The provision, in this section of the Constitution, that the powers and duties of the office of President shall devolve on the Vice President, is identical, in legal effect, with the provision, in the 22d section of the Act of 1799, that the authorities and duties vested in the collector shall devolve on his deputy. Three times, since the adoption of the Constitution, the President has died, and, under the provision referred to, the powers and duties of the office of President have devolved upon the Vice President. All branches of the Government have, under such circumstances, recognized the Vice President as holding the office of President, as authorized to assume its title, and as entitled to its emoluments. The Vice President holds the office of President until a successor to the deceased President comes to assume the office, at the expiration of the term for which the deceased President and the Vice President were elected. The deputy, under section 22 of the Act of 1799, holds the office of collector, until a successor to the disabled or deceased collector is duly appointed, and ready to enter upon the execution of his office. It has never been supposed that, under the provision of the Constitution, the Vice President, in acting as President, acted as the servant, or agent, or *locum tenens* of the deceased President, or in any other capacity than as

holding the office of President fully, for the time being, by virtue of express authority emanating from the United States. So, in the case of the collector, the deputy, in acting as collector, after the death of the collector who constituted him such deputy, does not act as the servant or agent of the deceased collector, but holds the office of collector fully, for the time being, by virtue of express authority emanating from the United States. The fact that, in the one case, the Constitution itself designates the person on whom the powers and duties of the office shall devolve, and that, in the other case, the collector is authorized, before his decease, to designate such person, makes no difference in the principle. The person so legally designated becomes, when he assumes the powers and duties so devolved upon him, the direct agent of the Government, and not the agent or servant of any individual who may have designated him.

It is, also, a well established principle, that no officer is entitled to the emoluments of an office for any longer period than the period during which he holds the office. And the legislation of Congress is to this effect. The purport of the statutory provisions on the subject of the compensation of public officers, (*Act of March 3d, 1839, § 3, 5 U. S. Stat. at Large, 349; Act of August 23d, 1842, § 2, Id., 510; Act of August 26th, 1842, § 12, Id., 525; Act of September 30th, 1850, § 1, 9 Id., 542, 543,*) is, that no person is entitled to receive the emoluments of an office which he does not hold. (*Opinion of Attorney General Crittenden, 5 Opinions of Attorneys General, 768.*)

In the present case, Mr. King, by his death, ceased to hold the office of collector; and not only so, but the duties and authorities before that time vested in him, then devolved on the defendant, because the defendant had, during the lifetime of Mr. King, been duly constituted by him his deputy, in accordance with the provisions of the 22d section of the Act of 1799. The designation of the defendant as deputy, made by Mr. King, was made strictly in accordance with those provisions. The instrument refers to the section, and then

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states, that Mr. King constitutes and appoints the defendant special deputy collector of the customs, within the district of the city of New York, to act for him during his absence or sickness, and then adds, "and, in case of my disability or death, the duties and authorities vested in me as collector, will, by law, devolve on you, my special deputy."

I am unable to see any ground upon which the right of Mr. King to the emoluments of the office of collector, after his death, can rest. It is urged, that the provision of the section in question, which declares that the estate of the deceased collector shall be liable for the conduct of the deputy, gives to the estate of the deceased collector a title to the emoluments of the office, during its administration by the deputy. Indeed, the claim of the plaintiff seems to be put wholly on that provision; and the idea that the defendant, in administering the office, under his appointment as such deputy, acted as the servant or agent of Mr. King, and not as a direct agent of the Government, can rest on nothing but that provision. But that provision cannot have the effect claimed for it. Under that clause of the 22d section which relates to the absence and sickness of the collector, he is entitled to the emoluments of his office while he is so absent or sick, and yet he is expressly, by the section, made answerable for the execution of the trust of his deputy, during such absence or sickness. But he is entitled to such emoluments in that case, not because he is answerable for the acts of his deputy during such absence or sickness, but because he himself, by the very terms of the Act, still exercises and performs the functions, powers, and duties of the office, although he does so by deputy. Under that clause of the same section which relates to the disability and death of the collector, he is not entitled to the emoluments of the office, after he dies, although his estate is, by the section, expressly made liable for the conduct of the deputy whom he designates. The reason why he is not entitled to such emoluments in that case, is, because he ceases, by his death, to hold the office, and to exercise or perform its functions, powers, and duties. The liability of his estate for

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the conduct of the deputy, after his death, is a special liability, attached by law, as a condition. No person is bound to accept the office of collector, but, if he does, he takes it subject to the burdens which the law imposes on the holding of it. Nor, after he takes it, is he compelled to appoint a deputy, under section 22 of the Act of 1799. The provision is permissive only. But, if he avails himself of it, and appoints a deputy, with the incidental advantage to himself of being able, under the section, to perform, by deputy, while occasionally and necessarily absent or sick, the duties of the office, and thus enjoy, while so absent or sick, its emoluments, he makes such appointment of a deputy subject to the condition imposed by the statute, that, on his own death, the duties and authorities of the office devolve on such deputy, and his own estate becomes liable, after his death, for the conduct of such deputy, while administering the office. Under the section, but one appointment of a deputy, for any purpose, can be in force at any one time. The same person, when designated, is to act in the cases of absence, sickness, disability, and death; and the collector, in availing himself of the privilege of performing the duties of his office, during his lifetime, while absent or sick, by such deputy, must take on himself all the liabilities which the designation of such deputy imposes. And there is nothing unreasonable in making the estate of the deceased collector liable for the conduct of the deputy, or in withholding from it, notwithstanding such liability, the emoluments of the office, during the term of such liability. The liability is imposed because the collector has the sole and unrestricted designation of the deputy. No superior officer of the Government has any voice in approving or disapproving, confirming or rejecting, such appointment. Hence, the manifest propriety of holding the estate of the deceased collector liable for the conduct of the deputy after the death of the collector, so long as such deputy continues to act as the agent of the Government, under a designation made by the deceased collector. But there would be no propriety in giving to the estate of the deceased collector the emoluments of the office

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during such period. The right to the compensation attached to an office grows out of the discharge of the duties of such office, and its emoluments do not belong to a person who does not discharge its duties. (*Conner v. The Mayor, &c., of New York*, 1 *Selden*, 296.)

I do not think that the fact that the defendant has, with or without the assent of the Government, continued to receive, during the period in question, the salary appertaining to the office of assistant collector of the customs at the port of New York, has any bearing upon the question of the right of Mr. King's estate to the emoluments of the office of collector during that period.

In passing on the question involved, I only decide that Mr. King's estate is not entitled to those emoluments. I do not mean to decide that the defendant is entitled to retain them. Whether there is any thing in the fact that the defendant accepted the salary of assistant collector, that precludes him from claiming the emoluments of the office of collector during the same period; or whether there was such an incompatibility between his acting as collector and his being assistant collector, as to make it impossible for him to hold both offices, and to authorize the Government to call upon him to elect which office he would hold, and whether he has, in fact, made such election in favor of the assistant collectorship; or whether, under the general rule and practice, that, where an officer holding one office is authorized to perform the duties of another, he may receive the emoluments of the office which he is thus temporarily filling, but cannot receive his own at the same time, the defendant may have the emoluments of the collectorship on relinquishing those of the assistant collectorship; or whether, if he would be otherwise entitled to the emoluments of the office of collector, he is not entitled to them because of his not having taken, on the death of Mr. King, the oath required by the 4th section of the Act of June 1st, 1789, (1 *U. S. Stat. at Large*, 23,) or the oath required by the 20th section of the Act of March 2d, 1799, (*Id.*, 641); or whether, as to so much of such emoluments as

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consists of fines, penalties, and forfeitures, the naval officer of the district and the surveyor of the port, are, under section 91 of the same Act, (*Id.*, 697,) entitled to what would have been Mr. King's share of the same if he had lived, on the ground that, within the meaning of that section, there was no collector in the district, until such a successor to Mr. King as the 22d section of that Act speaks of, was duly appointed—are questions not involved in this case, and in regard to which I neither express nor intimate any opinion.

The bill must be dismissed, with costs.

JAMES DRAKE AND OTHERS

vs.

ROBERT L. TAYLOR AND OTHERS. IN EQUITY.

An equitable lien cannot be enforced against money, or its representative, unless the money, or a specific substitute for it, can be identified.

Where H. individually, and T. individually, signed an agreement, whereby they agreed to account to D. for the proceeds of certain bills of lading, which were simultaneously delivered by D. to H., for himself and T., they being partners, and for any insurance money which should be received as such proceeds, until certain drafts accepted by D., for account of such partnership, against the goods covered by the bills of lading, should be provided for, the bills of lading having been held by D. as security for such acceptances, and the goods having been insured by such partnership, in the name of H., and having been lost at sea: *Held*, that T. and H. were liable, the two jointly, and each of them individually, to fulfill such agreement; and, T. and H. having become insolvent, and assigned their partnership, as well as their individual estates, for the benefit of their creditors, that D. had a right, at his election, to come in, under such assignment, as a creditor of T. and of H. individually, and to exhaust his remedy thereunder, against the separate estate of each of them, and afterward come in on the surplus of the joint estate of the two, after the payment of the joint debts of the two.

(Before BLATCHFORD, J., Southern District of New York, December 31st, 1867.)

THIS was a motion for a provisional injunction. The plaintiffs were merchants and bankers, residing in London,

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and composing the firm of Drake, Kleinwort & Cohen. In April, 1867, the plaintiffs, through Simon De Visser, their agent at New York, issued a letter of credit, at New York, to the defendant Henry W. Hubbell, authorizing drafts at four or six months after sight to be drawn on the plaintiffs at London, by a house in Hong Kong and two houses in Manila, for account of Hubbell and the defendant Robert L. Taylor, (under the name of Taylor & Hubbell, of New York,) against shipments of produce to New York, to the amount of £30,000 sterling, the invoices and bills of lading of the shipments to be sent to De Visser, at New York. Hubbell, for himself and Taylor, agreed to provide funds to meet the drafts at maturity, and pledged to the plaintiffs all property that should be purchased with the credit and its proceeds, and the policies of insurance on it, and the bills of lading of it, as collateral security for the payment of the drafts, with authority to the plaintiffs to take possession of the property, at discretion, for their security. Under this letter of credit, drafts were drawn on the plaintiffs, to the amount of £29,320 14s. 9d. sterling, which they accepted. These drafts were drawn against a shipment of 5,699 bales of hemp, and 6,478 bags of sugar, by the British ship Hotspur, from Manila to New York, and the bills of lading therefor were duly sent to De Visser. This cargo was insured by Taylor & Hubbell, in the name of Hubbell, in New York, under an open policy, for \$200,000, which was about the amount of the drafts in the paper currency of the United States. The vessel and cargo were totally lost on the voyage. After the loss, Hubbell applied to De Visser for the bills of lading, and delivered to him a written paper, signed by Hubbell and by Taylor, each individually, in the words following: "Received from Mr. Simon De Visser, of New York, as agent for Messrs. Drake, Kleinwort & Cohen, London, the following merchandise, viz., A 1,899 bales, LL 580 bales, RR 180 bales, L 3,040 bales hemp, B 2,642 bags, C 3,836 bags sugar, as specified in the bill of lading per Hotspur, Capt. Bryant, from Manila, which we jointly and severally agree to hold, on storage, as

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the property of the said Drake, Kleinwort & Cohen, with liberty to sell the same, and account to Simon De Visser, or to them, until the bills of exchange, drawn by Peele, Hubbell & Co., upon Drake, Kleinwort & Cohen, and accepted by them, for our account, £ sterling, due in London, 1867, for the purchase of the said goods, shall have been satisfactorily provided for. We agree to keep the property insured against fire, by policies satisfactory to Simon De Visser, and payable to his order, in case of loss, it being understood that he is not to be chargeable with any expenses incurred, the intention of this arrangement being to protect and preserve unimpaired the lien of Drake, Kleinwort & Cohen in said property. Signed in duplicate. New York, 1 August, 1867. Henry W. Hubbell. Robt. L. Taylor." The bill averred that, after the delivery of this paper to De Visser, Taylor and Hubbell, not having yet received from him the bills of lading, agreed with him that, if he would deliver to them the bills of lading, they would hold any insurance money they might collect on the cargo, as the proceeds of the cargo, (it having been previously stated by them to De Visser, that they could not collect the insurance money without having possession of the bills of lading,) and would, upon the receipt thereof, pay it over to De Visser, for the plaintiffs. This averment was denied by Hubbell, who swore that the bills of lading were received by the defendants from De Visser, without instructions of any kind as to the appropriation of the funds. De Visser delivered the bills of lading to Hubbell, and Hubbell, in whose name the insurance had been effected, collected and received, on behalf of himself and Taylor, the sum of \$200,000, as the insurance money, and applied it without discrimination, to the joint adventures of Taylor and himself, and in paying drafts and notes, and other joint indebtedness, of Taylor and himself. The drafts drawn on the plaintiffs were not provided for by Taylor or Hubbell. On the 24th of October, 1867, Hubbell and Taylor, each of them, made a separate assignment to the defendants Gardner, Irvin and Sherman, conveying all his estate, real and personal, of every

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name and description, and wheresoever situated, then owned and possessed by him, or in which he was in any manner interested, "upon trust, to sell and dispose of the same, and apply the proceeds thereof toward the payment and discharge of all and every debt and obligation owing by the party of the first part, or for which he is in any manner liable, without preference, and, in the next place, after the payment and discharge of every debt and obligation of the party of the first part, in full, to render the surplus, if any, to the party of the first part, his representatives or assigns." After these two assignments had been made and accepted by the assignees, Hubbell and Taylor, on the 26th of October, 1867, executed an assignment to the defendants Gardner, Irvin and Sherman, which contained the following recital: "Whereas, the said parties of the first part have been engaged in mercantile operations and business for their joint account, and, in the course and for the purpose thereof, have contracted joint liabilities, now outstanding, which they are not able to satisfy at maturity, and have acquired property and assets belonging to them jointly." It then recited, that each of the assignors had assigned "his property," by the assignment of the 24th of October, 1867, to the same assignees, "in trust for equal distribution among creditors." It then declared that the assignors, "to the end of devoting their joint property to the payment of their debts, as herein provided," assigned to the assignees "all the property, estate, and effects whatsoever, belonging to the said parties of the first part jointly, upon trust, to convert the same into money, and to apply the net proceeds thereof, after first paying thereout the lawful expenses and charges attendant upon the execution of the trust, to or toward the payment of all the joint debts and liabilities of the said parties of the first part, in full, if there be sufficient funds therefor, and ratably, if not sufficient; and, should there be a surplus, after such provision for the joint debts and liabilities, to apply the share of such surplus property belonging to each of the said parties of the first part, upon a due accounting as between them, to the payment of the individual debts and liabilities of such

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party to whom such share so belongs, in full, if there be sufficient funds therefor, and ratably, if not sufficient, and, should there be a surplus, to render and pay the same to such party to whom the same belongs." The property assigned by all of the assignments was not equal, in value, to the amount of indebtedness.

The plaintiffs claimed to have an equitable lien on the insurance money, and upon that which was the substantial representative thereof, in the hands of the assignees, and to be entitled to have the amount of such insurance money paid to them by the assignees, out of the assigned property. The bill set forth, that the value of the assigned property, in the hands of the assignees, was \$1,350,000; that, of that amount, only \$50,000 came to their hands as the property of Hubbell; and that the entire residue thereof was conveyed to them by Taylor individually. The bill also averred, that it was the duty of the assignees to marshal separately the assets of each estate assigned to them, and to appropriate the assets of each separate estate, in the first place, to the payment of the debts due by the assignors, severally and individually, before any payments were made by the assignees upon the joint indebtedness of Taylor and Hubbell; that the assets assigned by Taylor were more than sufficient to pay all his individual obligations, and to leave a surplus over for the benefit of the joint creditors of Taylor and Hubbell; and that the plaintiffs were entitled to have the \$200,000 insurance money treated by the assignees as the separate and individual debt of Taylor, and to have it paid out of the property assigned by Taylor individually, before any payment should be made by them on account of any of the joint indebtedness of Taylor and Hubbell. The bill also averred, that the assignees had declared it to be their intention to distribute the proceeds of the property conveyed to them by Taylor and Hubbell, *pro rata*, among all the creditors of Taylor and Hubbell, whether such creditors were creditors of Taylor and Hubbell jointly, or were separate creditors of Taylor and Hubbell individually; and that they had no right so to do. The assignees denied that they

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had made any such declaration, and averred that some of the liabilities were joint and some of them were several, and that Taylor's individual assets exceeded largely the aggregate of the liabilities contracted in his separate business, and that they believed it would be claimed by Taylor's creditors, that, in the liquidation of his affairs, his individual property was first applicable to the payment of his individual debts, before any of it could be appropriated to the payment of any partnership debt due from him and Hubbell.

The bill prayed, (1.) for an injunction restraining the assignees from disposing of so much of the property assigned by Taylor and Hubbell as should leave in their hands insufficient to pay to the plaintiffs the \$200,000, with interest and costs; (2.) for the appointment of a receiver of so much of the assigned estate as should be sufficient to pay the \$200,000; (3.) for a decree that the plaintiffs had a prior lien in equity upon so much of the assigned estate, in the hands of the assignees, as would pay the \$200,000; (4.) if no such prior lien existed, then for a decree that the plaintiffs were creditors of Taylor individually, for the \$200,000, and, as such, were entitled to be paid out of the assigned estate in the hands of the assignees, which came to them under the individual assignment of Taylor, prior to any payment by the assignees of any debts for which Hubbell and Taylor were jointly and not severally liable, and that the assignees should so marshal the assets of the assigned estates, and so appropriate the payments therefrom; and that, until the final decree in the cause, the assignees might be restrained, by injunction, from disposing of so much of the property assigned to them by Taylor individually, as should leave in their hands a sum not sufficient to pay the \$200,000 from the separate estate of Taylor, with interest and costs.

Clarence A. Seward, for the plaintiffs.

William M. Evarts, Joseph H. Choate, and Livingston K. Miller, for the defendants.

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BLATCHFORD, J.—The claim of the plaintiffs to have an injunction restraining the assignees from disposing of so much of the assigned property as shall leave in their hands insufficient to pay the plaintiffs the \$200,000, is based on the proposition that the plaintiffs have an equitable lien on the insurance money, and on that which is the substantial representative thereof, in the hands of the assignees, and that they are entitled to a decree that they have a prior lien in equity upon so much of the assigned estate in the hands of the assignees, as will pay the \$200,000. In regard to the \$200,000 insurance money, the bill avers, that it was converted by Taylor and Hubbell to their own uses, and was placed in their general business, for the benefit of their estate, either joint or several, and was applied by them to and for the benefit of their individual interests. The bill does not pretend that the money, or any specific substitute for it, can be identified. The money was received by Hubbell alone, and Taylor swears that no part of it ever came into his hands or possession, or was added to his estate, and that the property assigned by him to the assignees did not embrace any portion of the proceeds of the policies of insurance. Hubbell swears that the money was applied to the joint adventures of himself and Taylor, and in paying drafts and notes, and other joint indebtedness of Taylor and Hubbell, and was used generally, with other means and funds of Taylor and Hubbell, in protecting and paying their debts and liabilities on joint account. Under these circumstances, the money having been mixed and confounded with other money, and neither it nor any substitute for it being shown to be capable of ascertainment or identification, or to be in existence anywhere, the right of the plaintiffs to follow the money, and to claim a lien upon any thing in respect of it, is gone. (2 *Story's Eq. Juris.*, §§ 1258, 1259.) It may very well be, that Hubbell, when he received the insurance money, received it subject to a trust, either to pay it over to De Visser, or to apply it toward the payment of the drafts accepted by the plaintiffs, and that it was wrongfully misapplied by Hubbell. But, unless its identity, or the iden-

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tity of some property into which it has been wrongfully converted, can be traced, the rights which the plaintiffs may have had in regard to it, while it remained in the hands of Hubbell, or which they would have had in regard to any traceable property into which it was wrongfully converted, are gone. This being so, the plaintiffs are not entitled to a decree that they have a prior lien in equity upon so much of the assigned estate in the hands of the assignees, as will pay the \$200,000, nor to an injunction restraining the assignees from disposing of so much of the property assigned by Taylor and Hubbell, as shall leave in their hands insufficient to pay to the plaintiffs the \$200,000.

The instrument of the 1st of August, 1867, was a very strange paper to be given by Taylor and Hubbell, and accepted by De Visser, on the existing facts of the case. The merchandise had been lost at sea, to the knowledge of the parties, and yet the paper purports to be a receipt for the merchandise by Taylor and Hubbell, with an agreement by them to hold it on storage, as the property of the plaintiffs, with liberty to sell it, and account to the plaintiffs, or to De Visser, for its proceeds, until the drafts accepted by the plaintiffs, for the purchase of the merchandise, should have been satisfactorily provided for; and the paper declares the object of the arrangement to be, to protect and preserve unimpaired the lien of the plaintiffs in the property. The agreement is signed by Hubbell, individually, and by Taylor, individually, and purports, on its face, to be a joint and several agreement by them. This agreement, taken in connection with the accompanying delivery of the bills of lading by De Visser to Hubbell, for himself and Taylor, on the faith of the agreement, must, I think, be construed to be an agreement by Taylor and Hubbell, jointly and severally, to account to the plaintiffs for the proceeds of the bills of lading, and for the insurance money received as such proceeds, until the drafts accepted by the plaintiffs should be provided for. It created an obligation or duty in Taylor, individually, and in Hubbell, individually, as well as in Taylor and Hubbell, jointly, to fulfill such agreement,

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and, as a consequence of the diversion of the money, it makes each of them individually, as well as the two jointly, liable to respond, as debtors, to the plaintiffs, for the \$200,000. The plaintiffs, coming into this Court by this bill, have a right to say, under these circumstances, if they choose to do so, that they will come in first as creditors of Taylor and of Hubbell, individually, and exhaust their remedies, under the assignments, against the separate estate of each of them, and afterward come in upon the surplus, if there should be any, of the joint estate of the two, after the payment of the joint debts of the two. The plaintiffs say, by their bill, that they desire to have the debt treated by the assignees as the separate and individual debt of Taylor, and claim that, therefore, they are entitled to have it paid out of the property assigned by Taylor, individually, before any payment shall be made by the assignees on account of any of the joint indebtedness of Taylor and Hubbell. I think this claim is well founded. It is doubtful whether any thing passed to the assignees by the joint assignment of the 26th of October. The two assignments of the 24th of October assigned to the assignees all the estate, real and personal, of each assignor, of every name and description, and wheresoever situated, then owned and possessed by him, or in which he was in any manner interested, and the trust in each of these assignments is, to pay every debt owing by the assignor, or for which he is in any manner liable, without preference. It would seem, therefore, that the assignees must hold all the assigned property under the first two assignments, and must administer it under the trusts therein declared. This being so, the plaintiffs, coming into Court with a claim against Taylor, individually, as they do, are entitled to a decree that they are creditors of Taylor, individually, for the \$200,000, and, as such, are entitled to be paid out of the property assigned by Taylor, individually, prior to any payment, by the assignees, of any debts for which Hubbell and Taylor are jointly, and Taylor is not severally, liable, and that the assignees so marshal the assets of the assigned estates, and so appropriate the payments therefrom. This

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being so, they are also entitled to an injunction restraining the assignees, until the final decree in the cause, from making any transfer or disposition of any of the property assigned to them by Taylor, individually, which can interfere with such right of the plaintiffs. It does not appear whether the property assigned by Taylor, individually, will be sufficient to pay in full all the debts of Taylor, individually. Therefore, so much of the injunction asked for as would compel the assignees to keep in their hands sufficient of the property assigned by Taylor, individually, to pay the plaintiffs their \$200,000 in full, cannot be granted. But they are entitled to an injunction restraining the assignees from disposing of so much of the property assigned to them by Taylor, individually, as shall leave in their hands less than will be sufficient to pay the plaintiffs, out of the separate estate of Taylor, the proper *pro rata* proportion thereof properly applicable to their claim, upon the principle of paying out of the property assigned to them by the individual assignment executed by Taylor on the 24th of October, all the debts of Taylor, individually, prior to paying therefrom any debts for which Hubbell and Taylor are jointly, and Taylor is not severally, liable.

It may be, that the assignees cannot close their trusts without bringing into some proper Court, by a direct proceeding, other creditors, whose interests may be affected by the manner in which those trusts are administered. But that is no reason why the plaintiffs, on making out, as they have done, a proper case for the special relief they ask for, should not have it. So far as any other creditors, who claim under the assignments, are concerned, they are represented, sufficiently for the purposes of this suit, by and through the assignees, against whom alone the plaintiffs ask any relief.

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THE OCEAN QUEEN.

After an appeal has been duly taken from the decree of this Court to the Supreme Court, by the claimant, in an admiralty suit, *in rem*, this Court will not, on the application of the claimant, under the 12th Rule of the Supreme Court, order that a commission issue to examine witnesses who are named, so that their depositions may be made available to the claimant on the appeal, although he has prayed, in his petition of appeal, that the cause may be tried anew in the Supreme Court, as well upon the proceedings and evidence in the Courts below, as upon such further depositions and evidence as the claimant may present to the Supreme Court.

The 12th Rule of the Supreme Court, explained.

Under that Rule, it is for the Supreme Court to decide, on a motion to be made to it, whether the evidence sought to be taken will be admissible in the case, before a commission can be issued by this Court.

(Before BLATCHFORD, J., Southern District of New York, January 6th, 1868.)

THIS was an application, on the part of the claimant in an admiralty suit, *in rem*, for an order that a commission issue, pursuant to the practice of the Supreme Court of the United States, to examine certain witnesses, who were named, so that the depositions of such witnesses might be made available to the claimant on an appeal which he had taken to the Supreme Court, from the decree made by this Court in the cause. It was stated in the affidavit on which the application was founded, that the claimant had "duly appealed" to the Supreme Court, and had prayed, in his petition of appeal, that the cause might be tried anew in the Supreme Court, as well upon the proceedings and evidence in the Courts below, as upon such further depositions or evidence as the claimant might present to the Supreme Court, according to the course and practice thereof; and that the desired proofs were very material and necessary to the claimant upon the appeal. The libel was filed in the District Court for this District, to recover damages for a collision on the high seas. The District Court decreed for the libellant, and this Court, on appeal, affirmed the decree.

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William M. Evarts and *Joseph H. Choate*, for the libellant.

Charles A. Rapallo, for the claimant.

BLATCHFORD, J.—This application is sought to be maintained under the 12th Rule of the Supreme Court, which is as follows: "1. In all cases where further proof is ordered by the Court, the depositions which shall be taken shall be by a commission to be issued from this Court, or from any Circuit Court of the United States. 2. In all cases of admiralty and maritime jurisdiction, where new evidence shall be admissible in this Court, the evidence by testimony of witnesses shall be taken under a commission, to be issued from this Court, or from any Circuit Court of the United States, under the direction of any judge thereof; and no such commission shall issue but upon interrogatories, to be filed by the party applying for the commission, and notice to the opposite party, or his agent or attorney, accompanied with a copy of the interrogatories so filed, to file cross-interrogatories within twenty days from the service of such notice; Provided, however, that nothing in this rule shall prevent any party from giving oral testimony, in open Court, in cases where, by law, it is admissible." This case, having been removed into the Supreme Court by appeal, this Court has no longer any general jurisdiction over it. Any power which this Court has to grant the application in question, must be derived from some special authority conferred upon it. The 12th Rule of the Supreme Court is the only authority that is invoked. Under that rule, this Court has more authority to issue a commission than any other Circuit Court. The permission is general, and confers authority, in given cases, upon any Circuit Court. The purport of the rule would seem to be, that the commission is to issue from the Circuit Court having jurisdiction where the witnesses are to be found, so that the attendance of the witnesses may be enforced by subpoena, under section 1 of the Act of January 24th, 1827, (4 *U. S. Stat.*

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at Large, 197.) In the present case, it is not shown where the witnesses reside or are to be found, nor is it shown that any order has been made by the Supreme Court for further proof in the case. The authority of this Court, if the witnesses are within reach of its process, must, under the 12th Rule, rest solely upon the fact, that this is a case of admiralty and maritime jurisdiction, and that new evidence in it is admissible in the Supreme Court. But this Court cannot determine whether such new evidence is admissible. The case being in the Supreme Court, it is for that Court to determine as to the admissibility of the new evidence. There is no reported decision, as to the proper practice under the 12th Rule, in a case like this. The claimant insists that he has a right to the commission, leaving it to the Supreme Court, when the depositions are presented to it, to say whether the evidence shall or shall not be admitted; and that, as he has, in his petition of appeal, prayed for a trial in the Supreme Court, on the evidence below, and on new evidence to be taken, the case is thus brought within the class of cases mentioned in the second subdivision of the 12th Rule, where new evidence is admissible in the Supreme Court. The question is one not entirely clear, but I think the safer course is to deny the application, on the ground that it is for the Supreme Court to decide, on a motion to be made to it, whether the evidence sought to be taken will be admissible in the case, before a commission can be issued. If I should grant the application, and the Supreme Court should hold that the Circuit Court was without authority to do so, the claimant might suffer serious prejudice; whereas, if he now applies to the Supreme Court, and shows that an application to this Court has been refused on the ground stated, the practice under the rule will be settled by the Supreme Court, and the claimant will not be liable to suffer any prejudice from an error in practice.

The motion is denied.

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THE AMERICAN WOOD PAPER COMPANY

v8.

THE FIBRE DISINTEGRATING COMPANY. IN EQUITY.

The Watt and Burgess reissued patent, No. 1,448, for a pulp suitable for the manufacture of paper, made from wood, or other vegetable substances, by boiling the wood or other substances in an alkali, under pressure, as described, is not a valid patent for a new product.

The process of producing such pulp from wood and other vegetable substances, covered by the Watt and Burgess reissued patent, No. 1,449, was not invented by them prior to the issue of the original patent.

The process covered by the Mellier patent, granted August 7th, 1857, of disintegrating vegetable matter, for the purpose of producing pure cellulose, fit for the manufacture of paper, was first invented by Mellier.

The claim of the Mellier patent is not limited to the use of such process in treating straw alone, but extends, also, to the use of it in treating bamboo.

Such process consists in the use of a solution of pure caustic soda, under pressure, at a high temperature, to disintegrate the vegetable matter, and, if that process is used, the patent is infringed, even though the matter is partially disintegrated by a previous process.

The minimum pressure required by the Mellier patent, is the pressure indicated by 55 pounds upon the steam gauge.

(Before BENEDICT, J., Eastern District of New York, January 7th, 1868.)

THIS was a suit in equity, founded upon five different letters patent, relating to the production of pulp fit for the manufacture of paper, which patents, it was alleged, the defendants had infringed.

BENEDICT, J.—The questions raised in this case are so similar to those already considered in other actions founded upon the same patents, and especially in an action brought by the same plaintiffs, in the Circuit Court for the Eastern District of Pennsylvania, and there decided since the commencement of the present suit, that I feel relieved of much of the responsibility which I should otherwise feel in disposing of ques-

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tions of this character. In the light of these decisions, my way to a correct determination is not obscure. As to two of the patents sued on—the patents reissued to Watt and Burgess, and numbered 1,448 and 1,449, the determination of the Court in Pennsylvania, in the case referred to, furnishes an authority from which I should not feel at liberty, had I the inclination, to dissent. In accordance with that authority, it must be held, that the Watt and Burgess patent, No. 1,448, which is for a pulp suitable for the manufacture of paper, made from wood, or other vegetable substances, by boiling the wood, or other substances, in an alkali, under pressure, as described, cannot be sustained, as a valid patent for a new product. Aside from that authority, I should feel bound to say, that it appears impossible to consider that to be a new material, patentable as a new product, which is simply a substance long well known to exist in wood and other substances, left in a state “nearly pure,” and, consequently, fit for the manufacture of paper on being bleached, by the removal from it of the intercellulose with which it is found to be combined in wood. The patent, No. 1,448, is for such a material, as a new product, in the production of which, under the patent, if there be any thing new, it is, as it seems to me, the process and not the product.

The same authority must also dispose of the plaintiffs’ case, so far as it rests upon the Watt and Burgess patent, No. 1,449, which is for the process of producing this material from wood and other vegetable substances, as described. As regards this patent, the learned Judge of the District Court, who took part in the decision of the Pennsylvania case, in his opinion, as delivered, makes the case turn upon the question of fact, whether the process described in the reissued patent, was invented by Watt and Burgess prior to the issue of their original patent in 1858; and he finds, upon evidence in substance the same as the evidence before me in this case, that this process had not then been invented by Watt and Burgess. Such is, also, my conclusion; and I am, also, of the opinion, that the reissued patent is for a process substantially different

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from any described in the original patent. So far, then, as the bill rests upon the two Watt and Burgess patents, Nos. 1,448 and 1,449, it must fail.

But the plaintiffs have not based their action upon the Watt and Burgess patents alone. They have also averred and proved the ownership of a patent issued to one Mellier, on the 7th of August, 1857, and numbered 17,387. This patent is for the use of a vessel of a peculiar description, for heating the material, in the manufacture of paper pulp, and also for a process of disintegrating vegetable matter, for the purpose of producing pure cellulose fit for the manufacture of paper. It is the latter claim alone which is called in question here. This patent, also, was brought to the consideration of the Court in the Pennsylvania case referred to, where the Judges differed in opinion respecting it. It has, likewise, been considered and passed upon by Judge Hall, in the Circuit Court for the Northern District of New York, in the case of *Buchanan v. Howland*, (2 *Fisher's Patent Cases*, 341.)

To the claim based upon the patent of Mellier, the first ground of defence taken here is, that the evidence does not show Mellier to have been the first inventor of the process described in his patent. The same point was taken in the Pennsylvania case referred to, and there Judge Cadwalader held with the plaintiffs, and Mr. Justice Grier the contrary. In the case before Judge Hall, however, the patent was sustained by the Court, as for a new and useful process, described by Mellier. The evidence before me, upon the point in question, differs somewhat from the evidence presented in that case, but is substantially the same as that offered in the Pennsylvania case. I have considered it with care, and see nothing in it which should lead to a different conclusion from that arrived at by those experienced judges who have heretofore sustained the patent.

The next ground of defence is, that the Mellier patent is for a method of treating straw, and does not cover bamboo, which is the material most used by the defendants. This

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point I cannot consider to be free from doubt. In the opinion delivered by Judge Hall, in the case before him; the patent is always spoken of as a patent relating to straw. But, in that case, the infringement proved was in regard to straw, and the Court had no occasion to consider, and expressed no opinion, as to whether the patent extended to any other substance. In the Pennsylvania case, the point was fairly raised, and upon it Judge Cadwalader expressed the opinion, that the patent would cover any fibrous vegetable substance requiring like treatment with straw for the purposes in view, and that wood was within its scope, while Mr. Justice Grier considered the patent to be confined to straw, *et similia*. It appears to me quite manifest, from the language of the specification, that the patentee considered his process as applicable and beneficial, in the treatment not only of straw, but, also, of other vegetable substances. He uses, throughout, the phrase, "straw and other vegetable fibrous materials requiring like treatment." His description of his process nowhere limits it to the single article of straw, and his patent is for his process as described; but he does, in the last clause of his specification, say, "I also claim the within described process for bleaching straw," &c., "substantially as described." Now, his process described is not a process for bleaching, in the ordinary acceptation of that term, nor is it a process for treating straw alone. No person, looking at the whole paper, would fail to see that the patented discovery related to other material as well as straw; and, in view of the peculiar phraseology of the last clause, which is called the claim, and of the intention manifested elsewhere in the instrument, I incline to the opinion that, according to the principles applicable in the construction of patents, the last clause should not be held to be such a formal summing up and defining of the limits of the invention, as to restrict the patent to the single substance there mentioned. This must have been the conclusion of Mr. Justice Grier as well as of Judge Cadwalader. If, then, the patent extends to any other substance than straw, in the common and limited signification of the word, the defendants are

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within its scope, by reason of their treatment of bamboo. They appear to have treated common straw at times, but their principal article is bamboo, which they use for the purpose of producing from it the desired pulp, for the manufacture of paper. The stalks of this plant, which is the gigantic grass of the tropics, and belongs to the same botanical order with wheat, oats, etc., the defendants, by means of a peculiar process of their own, shiver into a mass of tendril-like shreds or strips, very like a mass of straw, which they then boil in caustic alkali, under pressure, having, sometimes, previously boiled it in spent alkali, in open vessels, and sometimes not. It is, certainly, a fibrous vegetable substance, requiring like treatment, for the purpose in question. It was treated by the defendants in the same way that they treated straw, and for the same purpose, and is, in form and substance, so very like to the common straw, that it must, in my opinion, be held to be within the scope of the Mellier patent.

But, again, it is said that the Mellier patent is a patent for a single stage chemical process, resulting in the production of pulp fit for paper, in which case the defendants do not infringe it, because their treatment is a two stage process. The principle of the Mellier discovery was, that the effect of a solution of pure caustic soda, upon certain vegetable substances, could be increased by the use of it under pressure, at a temperature not less than about 310° , so as to result in the production of the nearly pure fibre, without resort to any other chemical process, thereby saving both alkali and time. The final process used by the defendants is, as I understand the evidence, a process which invokes the same principle to produce the same result, and in substantially the same way. If this be so, they do not escape the patent by a previous shivering of the material into shreds, or by a previous boiling of it in an open vessel, in spent alkali, or by putting it through a beating engine. The material so previously treated is still a fibrous vegetable substance, requiring to be treated by the Mellier process to produce the pulp desired, and, when the defendants apply that process to it, they infringe.

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But the defendants insist that they do not infringe the Mellier patent, because they use a pressure lower than the minimum pressure required by the Mellier process, which they claim to be the pressure represented by 70 pounds upon the steam guage. Upon this point I concur with Judge Cadwalader in the opinion, that the minimum pressure of the Mellier patent is the pressure indicated by 55 pounds upon the steam guage, instead of 70 pounds. It is true that the patent designates 70 pounds, but it says internal pressure, and gives 310° as the corresponding temperature. Now, 310° is not a temperature corresponding with 70 pounds as indicated by the steam guage; and it is quite evident, I think, that the patentee, in mentioning 70 pounds, had in his mind the French tables, which differ from the American tables, and according to which the weight of one atmosphere, $14\frac{7}{16}$, must be deducted, to give the guage pressure intended to be indicated. Nor does the statement in the specification, that "a steam guage, properly fixed, will enable one to ascertain when the pressure has attained the required degree," appear to me to be inconsistent with this construction. Any skillful person would see, from the specification, that the internal pressure was to be considered; and that pressure he would ascertain by adding an atmosphere to the reading of the guage. According to the evidence, the defendants have, at times, used an external pressure of 60 pounds, equivalent to an internal pressure of 75 pounds, running down, it is true, at times, as low as 40 pounds; but their claim is to the right to any rate of pressure, which, according to the views here expressed, is untenable.

So, too, in regard to the strength of caustic alkali used, the defendants must be considered within the Mellier patent, which designates, for straw, a strength of from 2° to 3° Beaumé. The testimony of the defendants' witness, as explained by the defendants, gives a strength of less than 3½° Beaumé, as used by them, which would bring them fairly enough within the scope of the patent in question.

I have thus considered the principal objections made to

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the plaintiffs' demand, as based upon the Mellier patent, and my conclusion is, that the decree must be in favor of the plaintiffs, so far as that portion of their claim is concerned.

There remain to be considered the two boiler patents which are set out in the bill. As to those, it seems sufficient to say, that the first boiler patent of Keen, No. 25,418, is for a combination of which the stirrers described are a material part. The evidence shows, however, that the stirrers are not used by the defendants. Not using the plaintiffs' combination, they do not infringe their patent. The second, boiler patent, of 1863, No. 38,901, is for a combination of which the diaphragm and well are material parts. The defendants use no well with the diaphragm, but charge their boiler below the diaphragm. There is, then, no use of the plaintiffs' combination secured by the patent. So far, then, as the plaintiffs' case rests upon these two boiler patents, it must fail.

The decree must, accordingly, be in favor of the plaintiffs. The terms of it may be settled on notice to the opposite party, when I will dispose of the question of costs.

HENRY B. GOODYEAR, AS ADMINISTRATOR, &C., AND THE
VULCANITE JEWELRY COMPANY,

v8.

RICHARD J. ALLYN AND SAMUEL F. PHELPS. IN EQUITY.

Where, on a motion for an injunction to restrain the infringement of a patent, it was objected that the bill did not aver that the plaintiff marked, as required by section 13 of the Act of March 2d, 1861, (12 *U. S. Stat. at Large*, 249,) the articles made or vended under the patent: *Held*, that the objection was unavailing, because, (1.) It did not appear, by the bill, that the plaintiff had ever made or vended any articles under the patent, and the fact was not shown by the defendant; (2.) If that fact did appear, it would be for the defendant to show a failure by the plaintiff to mark, as required, the articles made or

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vended, and then the burden of proof would be on the plaintiff to show that, before suit brought, the defendant was duly notified that he was infringing the patent, and that he continued, after such notice, to make or vend the article patented; (3.) The penalty imposed by the statute, for a failure to mark patented articles, is only the taking away of the right to recover damages in the suit, and the right to an injunction, as a remedy, is not affected; (4.) It is questionable whether the statute applies to a suit in equity.

In a suit in equity on a patent, it is proper to join, as plaintiff, with the owner of the legal title to the patent, the party who is immediately injured by the infringement, and who is equitably entitled to the fruits of the recovery in the suit.

It is not necessary that the bill should, in such case, be verified by the owner of the legal title, if it is verified by his coplaintiff.

(Before BLATCHFORD, J., Southern District of New York, January 11th, 1868.)

THIS was a motion for a provisional injunction, to restrain the infringement of two reissued letters patent, granted to Henry B. Goodyear, administrator of Nelson Goodyear, May 18th, 1858, for an "improvement in the manufacture of India rubber," and numbered 556 and 557. They were reissues of an original patent granted to Nelson Goodyear, May 6th, 1851. The patent, as reissued, was extended May 5th, 1865, for seven years from May 6th, 1865. The reissues related to what is commonly known as "hard India rubber," or "vulcanite," No. 556 being for the process, and No. 557 for the product. Henry B. Goodyear, administrator, was the owner of the legal title to the reissues. The Vulcanite Jewelry Company was the owner of an exclusive license, under the reissues, in and for the whole of the United States, to make, use, and vend bracelets, earrings, brooches, beads, chains, charms, pins, and necklaces, designed to be worn about the person, for ornament, and, also, watch cases and watch keys. The bill averred that the Vulcanite Jewelry Company was in the full enjoyment of the rights and interests acquired by it, and that this suit was brought for its benefit, but it did not aver that the Company had ever made or vended any article under the patent. The bill was verified by the President of the Company, and the jurat contained an averment that the deponent verily believed Nelson Goodyear to have been the

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first and original inventor of the improvements claimed in the reissued letters patent.

William J. A. Fuller, for the plaintiffs.

Peter Van Antwerp, for the defendants.

BLATCHFORD, J. These reissued patents were fully sustained, on a final hearing, in a suit in Equity, in this Court, (*Goodyear v. New York Gutta Percha and India Rubber Vulcanite Co.*, 2 *Fisher's Patent Cases*, 312,) in 1862, against all defences of invalidity and want of novelty. On the present application, the defendants do not deny the infringement alleged, but they take three objections to the plaintiffs' bill.

By section 13 of the Act of March 2d, 1861, (12 *U. S. Stat. at Large*, 249,) it is provided, that, "in all cases where an article is made or vended by any person, under the protection of letters patent, it shall be the duty of such person to give sufficient notice to the public that said article is so patented, either by fixing thereon the word *patented*, together with the day and year the patent was granted, or when, from the character of the article patented, that may be impracticable, by enveloping one or more of the said articles, and affixing a label to the package, or otherwise attaching thereto a label, on which the notice, with the date, is printed; on failure of which, in any suit for the infringement of letters patent, by the party failing so to mark the article, the right to which is infringed upon, no damage shall be recovered by the plaintiff, except on proof that the defendant was duly notified of the infringement, and continued, after such notice, to make or vend the article patented." The objection taken is, that the bill does not aver that the plaintiffs, or either of them, marked, as required by the statute, the articles made or vended under the patent. There are several answers to this objection: (1.) It does not appear, by the bill, that the plaintiffs, or either of them, have ever made or vended any articles un-

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der the patent, and that fact is not shown by the defendants. (2.) If that fact did appear, either by the bill or otherwise, it would be for the defendants to show a failure by the plaintiffs to mark, as required, the articles made or vended, and then the burden of proof would be on the plaintiffs to show that, before suit was brought, the defendants were duly notified that they were infringing the patent, and that they continued, after such notice, to make or vend the article patented. (3.) The penalty imposed by the statute, for a failure to mark patented articles, is only the taking away of the right to recover damages in the suit. It does not affect the right to an injunction, either perpetual or provisional, as a remedy. (4.) It is questionable, whether the statute applies to a suit in equity, or to any other suit, except an action on the case for damages, brought under section 14 of the Act of July 4th, 1836, (5 *U. S. Stat. at Large*, 123,) that being the only species of suit in which the plaintiff can recover damages for the infringement of a patent. The plaintiff in a suit in equity on a patent does not recover damages. (*Livingston v. Woodworth*, 15 *Howard*, 546, 559.)

It is objected, also, that the plaintiffs are improperly joined, and that it is not proper, in a suit in equity on a patent, to join as plaintiff, with the owner of the legal title to the patent, a party who is a mere licensee. The practice is well settled, that it is proper, in a suit in equity on a patent, to join as plaintiff, with the owner of the legal title to the patent, the party who is immediately injured by the infringement, and who is equitably entitled to the fruits of the recovery in the suit. (*Goodyear v. The New Jersey Central Railroad Co.*, before Mr. Justice Grier, 1 *Fisher's Patent Cases*, 626, 629 ; *Stimpson v. Rogers*, before Judge Ingersoll, *Law's Digest*, 269, sec. 19.) It is averred, in the bill, that the Vulcanite Jewelry Company is entitled to sue for, and receive to its own use, in the name of Goodyear, administrator, and itself, all the damages occasioned by infringements of the reissues, by the manufacture, sale, or use of articles covered by the license to it, made in violation of the reissues, and that

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this suit is brought for its benefit. This suit is, therefore, properly brought in the name of those who are joined as plaintiffs in it.

The objection is taken, also, that the bill is not verified by Goodyear. The President of the Company is, on the facts, the proper party to verify it, and he has done so, and the verification contains the proper averments.

The infringement is made out by the affidavits on the part of the plaintiffs, and is undefended, and a provisional injunction must issue, according to the prayer of the bill.

THE UNITED STATES vs. JOHN W. GEORGE AND OTHERS.

The provisions of the Act of March 2d, 1867, (14 *U. S. Stat. at Large*, 546,) in regard to the distribution of the proceeds of fines, penalties, and forfeitures incurred under the provisions of the laws relating to the customs, commented on.

Those provisions apply to the proceeds of a forfeiture incurred under the 3d section of the Act of August 6th, 1846, (9 *U. S. Stat. at Large*, 54, 55.)

The provisions of the Act of 1867, compared with those of the 89th, 90th, and 91st sections of the Act of March 2d, 1799, (1 *U. S. Stat. at Large*, 695 to 697,) in regard to the distribution of the proceeds of forfeitures for a breach of its provisions.

The proper practice, under the Act of 1867, is for the Court to pay to the collector the amount recovered, less the charges allowed, and for the collector to deduct duties and charges, where proper, and to pay the residue into the Treasury of the United States, to be distributed, under the direction of the Secretary of the Treasury, to the persons, and in the proportions, prescribed by the decree of the Court.

Preparatory to such decree, the Court, while in possession of the fund, will determine disputes between persons claiming to share in the fund, as informers.

(Before BLATCHFORD, J., Southern District of New York, February 8th, 1868.)

IN this case, which was an action of debt, commenced by *capias*, on the 21st of December, 1867, to recover the sum of \$59,722 in gold coin, and \$32,000 in United States currency, "as and for forfeitures, penalties, &c., incurred for violations

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of the revenue laws of the United States," the defendants submitted to a final judgment for the above amounts, and paid the same into Court as the proceeds of such judgment. Those proceeds were in Court, awaiting such disposition of them as might be required by law. They were the proceeds of penalties and forfeitures incurred under the provisions of the laws relating to the customs. The record of judgment showed, that the declaration in the suit charged the defendants with having unlawfully and fraudulently withdrawn and removed from a bonded warehouse, certain merchandise which was subject to duty by law, without the payment of the legal duties thereon, in violation of the 3d section of the Act of August 6th, 1846, (9 *U. S. Stat. at Large*, 54, 55,) and claimed that the value of the merchandise, being the sums before mentioned, became thereby forfeited to the United States. Such 3d section provided, that, if any warehoused goods should be fraudulently removed from any warehouse, the same should be forfeited to the United States. A person who claimed to be entitled to an informer's share in such proceeds, now petitioned the Court to ascertain and determine who was entitled to the informer's share.

Christopher Fine, for the petitioner.

Benjamin K. Phelps, (*Assistant District Attorney*), for the United States.

BLATCHFORD, J. The 1st section of the Act of March 2d, 1867, (14 *U. S. Stat. at Large*, 546,) provides, that, "from the proceeds of fines, penalties, and forfeitures, incurred under the provisions of the laws relating to the customs, there shall be deducted such charges and expenses as are by law, in each case, authorized to be deducted, and, in addition, in case of the forfeiture of imported merchandise of a greater value than five hundred dollars, on which duties have not been paid, or, in case of a release thereof, upon payment of its appraised value, or of any fine or composition in money,

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there shall also be deducted an amount equivalent to the duties in coin upon such merchandise, (including the additional duties, if any,) which shall be credited in the accounts of the collector, as duties received, and the residue of the proceeds aforesaid shall be paid into the Treasury of the United States, and distributed under the direction of the Secretary of the Treasury, in the manner following, to wit: one-half to the United States; one-fourth to the person giving the information which has led to the seizure, or to the recovery of the fine or penalty, and, if there be no informer other than the collector, naval officer, or surveyor, then to the officer making the seizure; and the remaining one-fourth to be equally divided between the collector, naval officer, and surveyor, or such of them as are appointed for the district in which the seizure has been made, or the fine or penalty incurred, or, if there be only a collector, then to such collector." The section then provides for a different distribution where the information is given by the officer of a revenue cutter. The 4th section of the Act repeals specially two sections of two former Acts, relating to matters not involving any question arising in this case, and also repeals "all other laws, or parts of laws, inconsistent with, or supplied by, the provisions of this Act," and then provides, that "the Secretary of the Treasury shall prescribe all needful regulations to carry out and enforce the provisions of this Act."

These provisions of the Act of 1867 are, to some extent, a substitute for provisions contained in the 89th, 90th, and 91st sections of the Act of March 2d, 1799, (1 *U. S. Stat. at Large*, 695 to 697.) The 89th section authorizes the collector, within whose district a seizure is made, or a forfeiture is incurred, for any breach of that Act, to receive from the Court in which a trial is had of any issue of fact, in any suit founded on any such breach; the sum recovered, after deducting all proper charges, to be allowed by the Court, and requires him, on receipt thereof, to pay and distribute the same, without delay, according to law. The 90th section requires, that the proceeds of sales of property condemned

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by virtue of the Act, and not previously bonded, shall, after deducting all proper charges allowed by the Court, be paid by it to the collector of the district in which the seizure or forfeiture took place, as directed in the 89th section. The 91st section provides, that all fines, penalties, and forfeitures recovered by virtue of the Act, (and not otherwise appropriated,) "shall, after deducting all proper costs and charges, be disposed of as follows: one moiety shall be for the use of the United States, and be paid into the Treasury thereof, by the collector receiving the same; the other moiety shall be divided between, and paid in equal proportions to, the collector, and naval officer of the district, and surveyor of the port, wherein the same shall have been incurred, or to such of the said officers as there may be in the said district; and, in districts where only one of the said officers shall have been established, the said moiety shall be given to such officer; provided, nevertheless, that, in all cases where such penalties, fines, and forfeitures shall be recovered in pursuance of information given to such collector by any person other than the naval officer or surveyor of the district, the one-half of such moiety shall be given to such informer, and the remainder thereof shall be disposed of between the collector, naval officer, and surveyor, or surveyors, in manner aforesaid." The section then provides for a different distribution where any fines, forfeitures, or penalties incurred by virtue of the Act are recovered in consequence of any information given by any officer of a revenue cutter. By the 7th section of the Act of May 28th, 1830, (4 *U. S. Stat. at Large*, 411,) it is provided, that all forfeitures incurred under that Act shall be distributed according to the provisions of the Act of March 2d, 1799. The 1st section of the Act of March 3d, 1863, (12 *U. S. Stat. at Large*, 738,) provides, that property forfeited under that section, or its value, shall be disposed of as other forfeitures for violations of the revenue laws. The Act of 1846, which is the only Act claimed to have been violated in the present case, contains no provision giving any share to any person of any forfeiture for a violation of that

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Act, and no provision respecting the disposition of the proceeds of such forfeiture. I have been unable to find any provision by statute respecting the disposition of the proceeds of a forfeiture under the Act of 1846, or respecting shares in the same, except the provision in the Act of 1867. The provisions of the Act of 1799 refer solely to forfeitures for a breach of that Act itself. The Act of 1867, however, applies to the proceeds of all forfeitures incurred under the provisions of any laws relating to the customs. The Act of 1846 is a law relating to the customs.

On comparing the provisions of the Act of 1799 with those of the Act of 1867, in the particulars above recited, the following results appear: In respect to the channel of distribution, by the former Act, the Court is to pay the net amount remaining, after the deduction of proper charges, to the collector of the district, and he is to "pay and distribute the same without delay, according to law;" by the latter Act, it is not provided to whom the Court shall pay the net amount, but it is provided that the net amount shall "be paid into the Treasury of the United States, and distributed under the direction of the Secretary of the Treasury," in the proportions, and to the persons, designated by the Act, the Act not stating by whom it shall be paid into the Treasury. The Secretary of the Treasury is required, by the latter Act, to distribute the amount according to law, quite as much as the collector is required, by the former Act, to distribute the amount according to law. The amount is required, by the former Act, to be distributed under the direction of the collector, quite as much as it is required by the latter Act to be distributed under the direction of the Secretary of the Treasury. The provision, in the latter Act, that the Secretary of the Treasury shall prescribe all needful regulations to carry out and enforce the provisions of the Act, (the 2d and 3d sections of which relate to the seizure of books and papers in cases of fraud on the revenue, and to the enforcement of liens for freight on imported merchandise in the custody of officers of the customs,) gives to the Secretary no greater power, in

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respect to prescribing regulations in reference to the distribution of the proceeds of forfeitures, than the collector had in the same respect, under the former Act, in subordination to his superior officers, or than the Secretary himself had, under that Act. The 4th section of the Act of 1867 only repeals laws and parts of laws that are inconsistent with, or supplied by, the provisions of the Act of 1867. In respect to forfeitures for breaches of the Act of 1799, the provision of that Act, which requires the payment by the Court to the collector, of the net proceeds of such forfeitures, is not inconsistent with, or supplied by, any provision of the Act of 1867. In respect to such net proceeds, the proper construction of the Act of 1867 is, that the Court is still to pay to the collector, under the 89th and 90th sections of the Act of 1799, the amount recovered, after deducting all proper charges allowed by the Court. The collector is then to deduct, in proper cases, the amount representing duties, named in the Act of 1867, and any other lawful charges, and is to pay the residue into the Treasury of the United States. There is nothing, in the Act of 1867, which takes away the right given to the collector, by the Act of 1799, to receive from the Court the proceeds of forfeitures for breaches of that Act. So, also, with regard to forfeitures under the Acts of 1830 and 1863, and under any other Acts which adopt the mode of disposition of forfeitures prescribed by the Act of 1799. In regard to the duties mentioned in the Act of 1867, the collector is the proper person, and the only proper person, to ascertain the proper amount representing the duties, and it is impossible that that amount can be, as the Act of 1867 requires, "credited in the accounts of the collector, as duties received," unless the collector receives the amount, so as to credit the United States with it in his accounts, as duties received. I think that the Act of 1867 intends, that the collector shall receive from the Court the whole amount, and not merely an amount equal to the duties. The Act evidently recognizes the then existing practice, and assumes that the collector will receive from the Court the proceeds, less the lawful charges

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and expenses which the Court may allow to be deducted from the proceeds while in Court, and in substance provides, that he shall ascertain the duties, if any, and retain them, and then, instead of distributing the balance himself, shall pay it into the Treasury of the United States. And there is no reason for any different mode of procedure in the case of a forfeiture for a violation of the warehousing Act of 1846, nor is there any thing in the Act of 1867 to indicate that the collector is not to receive the proceeds of such a forfeiture. There may be duties to be ascertained and retained by the collector, in cases under the Act of 1846, quite as much as in cases under the Act of 1799, or under any other customs Act. The effect of the change made by the Act of 1867, in regard to the channel of distribution, is merely to substitute the Treasury of the United States for the coffers of the collector, as a place of deposit for the money, when nothing is left to be done in regard to it but to distribute it, and to substitute the Secretary of the Treasury for the collector, as the ministerial agent of distribution. In regard to the distributees, both Acts give the same quantum, one-half, to the United States; the Act of 1799 divides the other half equally among the collector, the naval officer, and the surveyor, except that, where some person other than the naval officer or the surveyor is informer to the collector, such informer receives a moiety of such other half, and the other moiety thereof is divided equally among the collector, the naval officer and the surveyor; the Act of 1867 gives one-fourth of the whole to the informer, and, if there be no informer other than the collector, the naval officer, or the surveyor, then to the officer making the seizure, and directs that the remaining one-fourth shall be equally divided among the collector, the naval officer, and the surveyor. Where an officer of a revenue cutter is the informer, the distributees and their shares are the same, under the two Acts.

Such being the state of the law on this subject, and the money before named being in Court, in this case, D. Henry Burtnett presents a petition to this Court, setting forth that

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he is the person who gave the information which led to the recovery in this case; that he claims an interest, as informer, in said money; that five other persons, named Davis, Webster, Wiggin, Giles, and Hefflin, also claim to have given information of the character aforesaid, and claim to be informers herein; and that the petitioner has served notice of his claim, as such informer, on the collector and on the United States Attorney. The prayer of the petition is, that the Court will refer it to a commissioner of the Court, to take proof of the facts, and of the respective claims and rights of the several persons claiming to be the informers herein, as such claimants, and report the same to this Court, with his opinion thereon, as to who is or are the informer or informers herein. Notice of the presentation of the petition has been served on the United States Attorney, and on the collector, and on the other persons named as claiming to be informers. It is contended on the part of the petitioner, that the Court has jurisdiction to determine the question, as to who is or are the person or persons entitled, as informer or informers, to share in the money. The Attorney for the United States denies the jurisdiction of the Court, and contends, that, under the Act of 1867, the Secretary of the Treasury has the exclusive power to determine who is the informer. On the part of the petitioner, it is urged that, independently of the Act of 1867, the Court has inherent jurisdiction to determine all claims to moneys which are in Court, and that such jurisdiction is not taken away by the Act of 1867; that, under the Act of 1799, and kindred Acts, it has always been held, by the Courts of the United States, that they have jurisdiction to examine and decide contested claims to the proceeds of forfeitures under the Act, while such proceeds are still in Court, and to direct in what manner they shall be distributed; that, it having been so held in respect to the Act of 1799, there is nothing in the Act of 1867 taking away or affecting such jurisdiction; that the Act of 1867 confers no authority on the Secretary of the Treasury to determine or adjudicate who the informer is, in case of a dispute; that, in such a case, a resort

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must be had to a proper judicial tribunal; that the Secretary of the Treasury has no judicial functions; and that the Act of 1867 merely makes him, instead of the collector, the ministerial officer for paying over the money to such persons as the proper judicial tribunal declares are entitled to it under that Act.

A similar question came before the Circuit Court of the United States for the District of New Jersey, in 1824, in the case of *Westcot v. Bradford*, (4 Wash. C. C. R. 492.) In that case, there was a forfeiture decreed by the District Court for New Jersey, of certain property, for violations of the Act of 1799. While the proceeds of the forfeiture were in that Court, Bradford presented to it a petition, setting forth, that the condemnation took place in pursuance of information given by him to the collector, and praying for the payment to him of the informer's share, one-quarter, given by the 91st section of the Act. The District Court made a decree, establishing the claim of Bradford, as informer, and directing that the money in Court be paid to the then collector, to be disposed of by him as directed by the decree. The decree disposed, finally, of the whole fund remaining in Court, as concerned all the parties interested in it—the United States, the collector who made the seizure, and the informer—leaving nothing to be done but to execute the decree. The collector appealed to the Circuit Court from the decree. The Circuit Court held, that the petition of Bradford was an original suit, from the decree in which an appeal would lie. An objection was taken, in the Circuit Court, to the power of the District Court to direct a distribution of the proceeds of the forfeiture remaining in Court. This objection was put on the ground, that the 89th section of the Act of 1799, which authorized the collector to receive from the Court, or its officer, the sums recovered, after deducting costs and charges, and enjoined upon him the duty of making the distribution, was imperative on the Court, and ousted its general jurisdiction to make the distribution. But the Court (Mr. Justice Washington delivering the opinion) held, that the 89th section

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vs.

AUGUSTUS SCHELL.

There is nothing in the Act of March 3d, 1851, (9 *U. S. Stat. at Large*, 629,) which justifies a collector of customs in requiring an importer of foreign merchandise to add to his invoice, as forming part of the dutiable value of such merchandise, charges for inland or coastwise transportation, whether by land or water, of such merchandise, from the place of its production or manufacture to another place, before it leaves its foreign port of shipment, for the United States.

A charge for commissions, at "the usual rates," forms part of such dutiable value. This charge must be made, whether the importer has paid any commissions or not; and a charge for commissions at a rate higher than the usual rate, cannot be made, even though the importer has paid a higher rate.

The charge for "costs and charges" must include those actually paid, and nothing more, and it is not lawful to insert an arbitrary estimate.

Under the Act of March 3d, 1857, (11 *U. S. Stat. at Large*, 192,) a valid prospective protest against the payment of duties, made on a particular importation of merchandise, and expressing the intention of the importer that the protest shall apply to all future similar importations made by him, is valid as to subsequent importations of similar merchandise on which like duties are exacted.

A protest against paying duties on costs and charges, because the goods were invoiced "free on board," is insufficient, unless the words "free on board" are found in the invoice.

A protest against paying duties on 2½ per cent. commission, because no commission was paid, is insufficient, it being immaterial whether any commission was paid or not.

Under the provision of the 5th section of the said Act of March 3d, 1857, which declares that the decision of the collector, unless appealed from, shall be final and conclusive as to the liability of goods to duty or their exemption therefrom, it is not necessary that the importer should appeal from the decision of the collector requiring the addition to the invoice of illegal charges for inland freight, and commissions, and costs and charges, in order to prevent such decision from being final.

(Before SMALLEY, J., Southern District of New York, March 3d, 1868.)

THIS was an action against the collector of the port of

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New York, to recover back duties paid under protest, and which were alleged by the plaintiffs to have been illegally exacted by the defendant, on sundry importations of goods from Europe. It now came up for a second trial, having been once tried in December, 1866. On the first trial, all the questions now raised were passed upon by the Court, except the question as to the construction and application of some of the protests. A verdict was rendered for the plaintiffs, and a reference was ordered to adjust the amount of the recovery. The adjustment was made, the report of the referee was filed, exceptions to such report were taken, and, after a hearing thereon, judgment was entered for the plaintiffs. The defendant excepted to various rulings made by the Court at the trial and on the exceptions to the report of the referee. When the case was in readiness to be taken to the Supreme Court, by the defendant, by writ of error, the parties agreed to set aside all the proceedings, and that a new trial should be had. It now took place before Judge Smalley and a jury.

In charging the jury, SMALLEY, J., said:

This case depends, almost exclusively, upon legal questions. It is, virtually, an action against the Government. No execution can issue against the collector, unless, in the opinion of the Court, he acted in bad faith, or, in the language of the law, "without probable cause." Against any errors of judgment, or erroneous constructions of law, the collector, as the law now stands, is protected.

The plaintiffs claim, in substance, that, commencing in July, 1857, and continuing through a period of years, until 1861, during nearly the entire time while the defendant held the office of collector of the port of New York, they were in the habit of importing merchandise from various places on the continent of Europe; that, when they presented their invoice and their entry, at the custom house, to the entry clerk, whose duty it was to superintend and take charge of that branch of the business, they were told that they must add certain specific items; that, in some cases, they were told they

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must add a larger amount for commissions than they admitted they were liable to pay—a larger amount than that which they say was the “usual rate” under the law; that they were compelled, also, to add certain fixed and arbitrary sums for inland transportation, and port charges, and other costs of various kinds; that, when they remonstrated with the officers against doing so, they were informed that, unless they made these additions, the entry would not be received; and that, in consequence of this, and for the purpose of obtaining possession of their goods, they made the entries as required, protesting against the payment of extra charges for commissions, and for other items. The plaintiffs claim, that their evidence tends to prove, (1.) That, in some cases, they paid no freight or charges of any kind, and that the goods were “free on board;” (2.) That, in other cases, they were compelled to add an arbitrary sum for costs and charges—more than the amount paid by them, although they paid something; (3.) That they were compelled to add to their invoices, internal freight; (4.) That they were compelled to pay duties on an extra charge for commissions, above the usual rate of commissions in the markets in which the goods were purchased; and, (5.) That they duly protested against these exactions, and only submitted to them for the purpose of obtaining possession of their goods. The defendant resists the recovery, on the ground that inland freight was properly added to the invoice, under the Act of March 3d, 1851, (9 *U. S. Stat. at Large*, 629,) and that the other costs and charges were proper and legal, under the Treasury instructions and the law.

The question as to inland freight has been a good deal discussed, and there has, undoubtedly, been some diversity of opinion in regard to it. On the 1st of February, 1856, Mr. Guthrie, then Secretary of the Treasury, issued Treasury regulations to collectors of the customs, in which he says: “Freight or transportation from the foreign port of shipment to the port of importation, is not a dutiable charge. In cases, therefore, of goods arriving in the United States, after having been first transported from the place of their production or

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manufacture to another port or place, whether in the same or another country, by land or by water, and thence transhipped for the United States, provided satisfactory evidence be adduced to the collector of customs at the port where the goods shall arrive, that they were originally shipped with the *bona fide* intention of having them transported to a port in the United States, as their final port of destination, no dutiable costs or charges will have accrued, either on the transportation from the first to the intermediate port, or while remaining in or leaving the latter, the voyage or transportation being regarded as continuous from the country whence originally exported in good faith, on a declared destination for a port and parties in the United States." This construction was thus early given to this Act by the Treasury Department.

The question came before the Circuit Court in California, in *Gibb v. Washington*, (1 *McAllister's Rep.*, 430,) in July, 1858. The Court consisted of Judges McAllister and Hoffman, and the opinion was that of the full bench. The question was carefully considered, and the Court says, that charges for the transportation of goods from the interior of the country, by railroad or water carriage, incurred prior to the time of exportation, cannot be added to the value of the goods, to be ascertained in the manner prescribed by the Act of March 3d, 1851.

The same question was raised in this Court, at the April term, 1860, in *Strange v. Redfield*, and a series of other cases, in all of which the plaintiffs recovered. A question was raised in those cases, as to the sufficiency of the protests, which was argued at the October term, 1860, but the Court decided them to be sufficient, and the judgments were paid.

A Treasury circular was issued on the 21st of May, 1863, while the present Chief Justice of the United States was Secretary of the Treasury, reaffirming the principle laid down in the Treasury regulations of 1856, and in accordance with the decision of the Court in *Gibb v. Washington*.

It is, undoubtedly, true, that the action of the Treasury Department has not been uniform upon this subject. It

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appears that, in some cases, both coastwise and inland freights have, by order of the Treasury Department, been added, to make dutiable value. The Courts, however, as soon as the question was brought before them, decided that coastwise freight was not dutiable; and I think that the correctness of that decision has never been questioned, except upon this trial, and has been invariably acquiesced in by the Treasury Department. It appears that different Secretaries have, at different times, ordered duties to be refunded, that were paid on charges for freight from Nantes to Paris, from Manchester and Glasgow to Liverpool, and from Buenos Ayres, via Montevideo, to New York. This last question was decided by Mr. Justice Nelson and Judge Betts, in *Wilbur v. Lawrence*, (2 *Blatchf. C. C. R.*, 314.)

But, it is claimed that there is a difference between inland freight and water freight. No reason has been assigned for any such distinction, and I cannot conceive of any. It must be purely arbitrary. Why should duty be charged on goods sent by rail from Nantes to Havre, when it cannot be if they are sent down the Loire? And what difference does it make whether goods are forwarded from Glasgow to Liverpool, for New York, by rail or down the Clyde? I think that there is nothing in the Act of March 3d, 1851, nor any sound reason, to warrant any such distinction. The policy of the Tariff Acts is, to equalize the duties on goods of similar descriptions; and, to interpolate this arbitrary distinction into the law would, in many cases, defeat that object. The present Secretary of the Treasury, in his Circular of April 16th, 1867, abolishes all distinction between inland land and water carriage, as to charges for freight on merchandise imported from the adjoining British Provinces into the United States, which shows that he, too, regards this arbitrary distinction as unfounded and unjust. I am satisfied, therefore, that the charges added for inland freight were made in violation of law, and ought to be refunded.

Then, as to commissions. The statute requires the charge to be of "the usual rates." This term has received a judicial

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construction. If it had not, it would seem to be very difficult for lawyers to differ upon the subject. There seems to be room for but one opinion. It is not what the importer may have paid as commissions. He may have procured his goods without paying any commissions; but he will still be liable for a charge for commissions, and must pay the duty upon it. On the other hand, he may have paid much more than the usual rate of commissions. But he is not bound to pay duty on more than the usual rate, because that is the sum fixed by law. What the usual rate is, is a question of fact.

The costs and charges actually paid, if not included in the invoice, should undoubtedly be added. The officers of the customs have no more right than the merchant has to make an arbitrary estimate, for the purpose of convenience. The merchant is bound to enter the costs and charges, as they were paid. If none were paid, if the goods were delivered "free on board," then, as has been repeatedly held in this Court, the importer is not liable for any, for the reason that these charges entered into, and constituted a part of, the market value of the goods. This point has been repeatedly decided by Mr. Justice Nelson, the presiding judge of this Court, and by Judges Betts, Hall, Ingersoll, and Shipman, and by myself.

Therefore, so far as this class of cases is concerned, whenever it appears, upon examination, that inland freight has been added to the invoice, or that the plaintiff has been compelled to pay duties on extra commissions, or that costs and charges have been added to a larger amount than have been paid, it follows that the duties exacted upon such additions were illegally exacted, and ought to be refunded.

The second objection taken by the defendant is, that there were no protests sufficient to entitle the plaintiff to recover in this case. The Act of February 26th, 1845, (5 *U. S. Stat. at Large*, 727,) required the protest to be made at or before the payment of the duties. The Act of March 3d, 1857, (11 *U. S. Stat. at Large*, 195,) under which these entries

were made, changes the expression, "protest," but uses language very similar, and says that the act must be done within ten days after the entry of the goods. The language of the Act of March 3d, 1857, as to what the protest must contain, is precisely like the language of the Act of February 26th, 1845, the later Act being, probably, copied from the earlier one, and provides that the protest shall set forth, distinctly and specifically, the grounds of objection to the payment of the duties, so that the collector may know the reason of the protest.

But, it is objected that, in some of these cases, there were no protests filed at the time, or even within the ten days. It is conceded, however, that there had been previous protests filed, which claimed to be prospective and continuous, and which the merchants intended to be so. In these protests they say: "You are hereby notified that we desire and intend this protest to apply to all future similar importations made by us."

The question of prospective protests has undergone a good deal of discussion in the Courts; but it seems to be now well settled, so far, at least, as this Circuit is concerned. The first time that this question arose, whether a protest of this kind, a prospective or continuous protest, was valid as to subsequent importations, was in the Circuit Court for the District of Maryland, before Chief Justice Taney, in the case of *Brune v. Marriott*, which appears to have been tried in April, 1849. The question was discussed before the Chief Justice by a very able lawyer, Mr. Reverdy Johnson, who maintained that the protest was invalid and insufficient. But the Chief Justice, after examining the question, decided that the protest was clearly sufficient, and said that there was nothing in the letter of the law, or in its reason or spirit, which required a protest to be attached to every particular entry that was made. That case of *Brune v. Marriott* went up, by writ of error, to the Supreme Court of the United States, and was there decided at the December Term, 1849. It is reported as *Marriott v. Brune*, in 9 *Howard*, 619.

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The question was again pressed upon the Supreme Court, by Mr. Reverdy Johnson, with his usual ability, as the report of the case will show. Mr. Justice Woodbury delivered the opinion of the Court, sustaining the opinion of the Chief Justice, and saying that the protest must be held to be valid. So far as appears from the report, this was the unanimous opinion of the Supreme Court. This was in May, 1850.

The question came up before Mr. Justice Nelson and Judge Betts, in this Court, in November, 1855, in the case of *Steegman v. Maxwell*, (3 *Blatchf. C. C. R.*, 365.) In the opinion, which was given by Judge Betts, but was the opinion of the full bench, the case of *Marriott v. Brune* is referred to, and the principle is established, that a prospective protest of this kind is sufficient to entitle the merchant to recover back duties illegally exacted from him. This ruling has been followed, in this Court, in very many instances, among which is the recent case of *Fowler v. Redfield*, which is not reported, but was decided by Mr. Justice Nelson, as lately as December, 1862; and this view seems to have been regarded as the settled rule in this Court. Certainly, I have so understood it myself, in disposing of this class of cases; and it must be regarded as settled in this Circuit, if not throughout the United States.

I am at a loss myself to conceive how a distinction can be drawn between this class of prospective protests, and the protest that was made in the case of *Brune v. Marriott*; for, clearly, the protest in this case is quite as distinct and specific as the protest in that case, if not more so, when we compare them.

Another suggestion may, and perhaps ought to, be made. All the protests in the cases referred to, were made under the Act of February 26th, 1845, the language of which, as we have already seen, is adopted in the Act of March 3d, 1857, to describe the character of the protest and the circumstances under which it may be made. The Act of 1857 does not use the word "protest," but uses another phrase. The protests in the cases referred to, having been made prior to the passage

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of the Act of 1857, it is hardly to be supposed that the eminent lawyers in both branches of Congress, when they adopted, in the Act of 1857, the language of the Act of 1845, did not know what construction the Courts had given to that language. It cannot be, that the Supreme Court decided this question in 1850, and that this legislation took place six years afterward, in ignorance of such decision. If it had been the design of Congress to change the construction which the Government and the Courts had given to the language used in the Act of 1845, it is very natural to suppose that they would have used different language, in the Act of 1857, in order to indicate such design.

There is but one case, so far as I am aware, in which the decision in *Marriott v. Brune* has been criticised; and that is the case of *Warren v. Peaslee*, (2 *Curtis' C. C. R.*, 231,) where Mr. Justice Curtis, in the Circuit Court for the District of Massachusetts, ruled that the protest was insufficient. He attempted to draw a distinction between the case of *Marriott v. Brune* and the case before him. I must confess, however, that it seems to me to be a distinction without a difference. The principle in each appears to be precisely the same.

But, if there were no judicial decisions upon the subject, the same result would be reached by reasoning. What is the object of the legislation providing for a protest? It is, that the collector shall be advised, distinctly and specifically, what it is which the merchant insists he ought not to pay, and what it is against which, as an illegal exaction, he protests, and what it is for which he intends to hold the collector responsible, under the law. Why is it necessary to repeat the protest? This case furnishes a very fair illustration. Here is a merchant, making some five hundred entries in this port, of precisely the same character, at least one every week in the year, and perhaps more. What sound reason is there for compelling him to go through the formula of saying, in each one of these cases, "I protest," when he has told the collector, in the first case, that he protests against that and against all

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similar exactions? I am at a loss to see that any good purpose would be answered by adopting such a construction.

The protest must set forth distinctly, specifically and truly, the objection to the payment of the duty, so that the collector may know what the merchant claims, and why he makes the claim. In some of the protests, in this case, the protest is against paying duties on costs and charges, because the goods were invoiced "free on board," when, by examining the invoice, it appears that the words "free on board" are not there. Such a protest is insufficient, because the invoice shows that the statement made in it is untrue, although it might have been good, if it had merely said, "free on board," omitting the word "invoiced." Others of the protests are against paying duties on two and one-half *per cent.* commission, because no commission was paid. That is insufficient, because it is immaterial whether any commission was paid or not. The duty was payable on the usual rate of commission. All such claims, therefore, the adjuster will disallow.

In relation to inland freight, it is immaterial whether the invoice shows that the goods were "free on board" or not; for, as we have already seen, inland freight was no more dutiable than coastwise or ocean freight.

The third objection made to the recovery in this case is, that no appeal was taken to the Secretary of the Treasury, under the 5th section of the Act of March 3d, 1857. In giving a construction to that Act, it is perhaps well and wise to consider the purpose of it. That it is a severe Act, one that was intended to, and does, limit and restrict the common law and equitable rights of the merchant, all must agree. It is a well-settled rule of construction, in all Courts, that Acts of this description shall be construed strictly, and that they shall not be extended any further than the language of the law requires, where they restrict or limit the common law or equitable rights of any individual. They must, however, be enforced, so far as the language of the law requires. The language of this Act, so far as this question is concerned, when it says that the decision of the collector shall be final

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and conclusive, unless it is appealed from under certain conditions afterward prescribed, is, that the decision of the collector shall be final and conclusive, "as to their liability to duty or exemption therefrom." What is "their liability to duty or exemption therefrom?" The question here is not, whether the language of the Act necessarily implies that the decision of the collector shall be final, when he decides whether a certain article is liable to duty, or, if liable, at what rate of duty—five, ten, or fifteen *per cent*. The question here is not, whether this property was liable to duty. It is conceded that it was. The question is not, what the rate of duty shall be—whether any of this property shall pay one rate or another. It is admitted to be liable to duty, and the rate is conceded. The merchant and the collector agree upon that. The collector claims, however, that certain charges should be added. This the merchant denies. Now, does it necessarily follow, from the reading of the language of the statute, construed as I have already stated it should be, that the decision of the collector shall be final upon that question? Such would not be my construction, even without authority; but I am gratified to find that I have been anticipated in this by a decision of the Treasury Department itself, having charge of these questions. It seems to have been the decision of Secretary Cobb, upon this precise question, in instructions to custom-house officers throughout the country, given December 20th, 1859, and April 7th, 1860, that, in such cases, the rule requiring an appeal did not apply, and that it was unnecessary to take it. Secretary Chase, on the 9th of June, 1862, took the same view, and, in a very full letter, says, that no appeal is required. This was in relation to this particular class of cases—costs and charges. It also appears, from various pieces of evidence, that these constructions of Secretary Cobb and Secretary Chase have been acted upon by the Treasury Department, in a great variety of instances. Thousands of dollars have been refunded, which would not have been refunded, if this 5th section of the Act of March 3d, 1857, had been understood to be applicable to this class of cases.

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It appears that, on the 30th of March, 1865, Secretary McCulloch repudiated this construction. But, even in that case, he reconsidered his ruling, and ordered judgments that had been recovered without an appeal to be paid. So that it can hardly be considered that there was a revocation of the previous action of the department. I hold, therefore, that the objection cannot be sustained, and that there is no bar to a recovery in this class of cases, to be found in the 5th section of the Act of March 3d, 1857.

On the former trial, three additional objections were made to the plaintiffs' right to recover. It was claimed, (1.) That the payments were voluntary, and that, therefore, they were not entitled to recover; (2.) That the action of the appraisers was conclusive, and the plaintiffs could not go behind it; (3.) That the illegal exactions, if any were made, were made by the defendant's subordinates in the custom house, and that he, as collector, was not liable for them. These objections are, at this time, all abandoned; and it is conceded that they constitute no defence.

There is a single question of fact, which I will now submit to the jury. What was the usual rate of commission, in Great Britain, between the 1st of July, 1857, and the 1st of January, 1861—the time embraced in these entries? What was it in Continental Europe, outside of Paris, and what was it in Paris? These questions the jury will answer by their verdict.

E. Delafield Smith, for the plaintiffs.

Samuel G. Courtney, (*District Attorney*), and *Simon Towle*, for the defendant.

Conover v. Dohrman.

JACOB A. CONOVER

vs.

JOHN H. DOHRMAN AND JOHN H. PEIPHO. IN EQUITY.

The first claim in the letters patent granted to Jacob A. Conover, May 13th, 1855, for a machine for splitting wood, namely, "a movable bed or carriage, for carrying and advancing the blocks of wood, in combination with the reciprocating cutters operating at right angles with the surface of the bed or carriage, substantially as and for the purpose specified," is infringed by the use of a machine for splitting wood, which contains every feature of the patented machine that is essential to the performance of the same result in substantially the same way, although the reciprocating cutters in it do not operate at right angles with the surface of the bed or carriage.

(Before SHIPMAN, J., Southern District of New York, March 9th, 1868.)

THIS was a final hearing, on pleadings and proofs, on a bill founded on letters patent for a machine for splitting wood, issued to the plaintiff on the 13th of May, 1855. In the body of the specification, the machine was called a machine for splitting kindling wood, and this was the particular work for which it was fitted.

Charles M. Keller, for the plaintiff.

Edwin W. Stoughton, for the defendants.

SHIPMAN, J. The bill in this case charges, that the defendants have infringed the first and second claims of the patent. The first claim is for "a movable bed or carriage, for carrying and advancing the blocks of wood, in combination with the reciprocating cutters operating at right angles with the surface of the bed or carriage, substantially as and for the purpose specified." The second claim reads thus: "In combination with the bed or carriage and reciprocating

cutters, substantially as specified, the employment of the clearing plate through which the cutters pass, substantially as and for the purpose specified." There is a third claim in the patent, but that is not in controversy here.

The construction and operation of the machine described in the patent are substantially as follows: A bed or carriage, composed of sections linked together in the form of an endless chain, is made to travel over a tackle and around drums or wheels placed at each end. Blocks of wood, of the required length of material for fuel, are placed upright on this bed. Over the bed, at the point where the block is to receive the blow which splits it, is a cutter, made in the form of a cross, so that the block may be split into small sticks, instead of slabs or boards, as would be the case if the cutter were composed of only one straight blade. The bed, with the block thereon, is put in motion by an intermittent feed, and the block is advanced under the cutter, at every throw of the feed mechanism, a distance measured by the range at which the feed mechanism is set. The cutter, firmly fastened above to a stock, works up and down with a reciprocating motion as the block passes under it, splitting the block as it descends, and then rising from it, so that it may be carried by the bed a step forward, when the cutter descends and splits again. As the blades of the cutter rise, they are cleared of any pieces of wood that may be clinging to them, by a clearing plate fixed above, and into which the cutter plays freely, as it rises and falls, through apertures or notches in the plate. When the machine is in motion, the bed not only carries the blocks to the point where they are split by the cutter, but it also carries off the wood after it is split. Of course this movable bed, could not, of itself, resist the blow of the cutter, as it is a mere series of sections linked together, and would yield downward at every blow, unless it were supported by a firm table underneath. Now, it will be seen, that the carrying bed moves horizontally, the block to be split stands vertical or upright, and the cutter, as it rises and falls,

operates vertically, and at right angles with the bed or carriage. When the cutter descends, the block is easily split, as the table over which the bed moves furnishes that resistance which a solid chopping block does to the common axe, as ordinarily used, in splitting short pieces of wood.

In the alleged infringing machine there is also a combination of parts, consisting of a movable bed or carriage, on which the block to be split is placed, a cutter, and a clearing plate, but these parts are differently distributed, so far as location is concerned, from the same parts in the plaintiff's combination. The carrying bed in the defendants' machine, as compared with that in the plaintiff's, moves across the machine instead of lengthwise, or, in other words, at right angles to the line of motion of the plaintiff's bed. This bed of the defendants' forms the bottom of a trough, the back side of this trough presenting an upright wall. The block is laid horizontally on this bed, with the base or heel of the block against the upright wall, and the top or end which is to first receive the blow of the cutter forward. Of course, the cutter is not placed over the block, but forward of it, not in a vertical, but in a horizontal position, so as to move in a line with the grain of the wood. In other words, as the block to be split lies in a horizontal position, the blade that is to split it from end to end must have a horizontal motion. The block being placed horizontally on the bed, the latter, by an intermittent feed motion, carries it into line with the cutter, and the latter, by a reciprocating movement, enters the end of the block and splits it. The upright wall or back side of the trough, being firm, furnishes a resistance which enables the cutter to cleave the block.

Now, by a recurrence to the language of the first claim in the plaintiff's patent, it will at once be seen, that there is one feature of the description which is not found in the defendants' machine—to wit, the operation of the cutters at right angles to the bed or carriage; and I am asked to so construe this feature of the description, as to hold the patentee to it as an essential element in his invention. It would fol-

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low, from such a construction, that, inasmuch as the defendants' cutters operate, not at right angles to the carrying bed, but in the same horizontal plane with it, there is no infringement. But, in my judgment, this feature of the operation of the plaintiff's machine, as it appears in his specification, is merely descriptive of that which is incidental rather than essential. The defendants have caused it to disappear by a transposition, or different distribution, of the active elements of the organized mechanism, while they have retained every feature of the plaintiff's machine which is essential to the performance of the same result in substantially the same way. Placing their block horizontally, they must give their cutter a horizontal line of motion; and, as the point of resistance, in order to be effective, must be in the same plane, they are obliged to shift it from under the carrying bed to the rear of it, and to give its face a vertical instead of a horizontal position. In so doing, they have, in my judgment, introduced no essential element that is not found in the plaintiff's machine, nor have they omitted any. They have simply avoided embracing an incidental and unimportant feature, which is no more vital to the plaintiff's invention, than is the shadow cast by a body vital to the body itself. I hold, therefore, that the change effected by the defendants in the mechanism is colorable and not material, and does not relieve them from the charge of infringement. As that part of the claim of the patent which describes the feature in question, relates to a nonessential matter, I do not feel called upon to hold the plaintiff strictly to it.

The shape of the defendants' knives is not like that of the plaintiff's; but the latter confines himself to no particular form of cutting instrument. In his patent he describes one form as preferable, but the defendants' are plainly equivalent.

I have examined the various patents put in evidence to antedate the plaintiff's invention, and compared them with it, but I do not find any which, in my judgment, embraces the same construction and arrangement.

A perpetual injunction must, therefore, issue, with an order of reference to a master to take an account.

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ARCHIBALD HOPKINS

vs.

ALEXANDER F. WESTCOTT AND OTHERS.

Where A., a passenger on a railroad, delivered to a carrier a metallic check, which he had received for his trunk, as baggage, so that the carrier might obtain the trunk, and deliver it at the residence of A., and received from the carrier, at the time, a paper, on which the number of the check was indorsed, and which contained a printed notice, that the carrier would "not become liable for merchandise or jewelry contained in baggage received upon baggage checks, nor for loss by fire, nor for an amount exceeding one hundred dollars, upon any article, unless specially agreed for, in writing, on this check receipt, and the extra risk paid therefor," and a statement that the owner thereby agreed that the carrier should be liable only as above: *Held*, that A. was chargeable with actual notice of the contents of the paper.

Held, also, that, by such paper, the responsibility of the carrier was qualified, to the effect stated in the paper.

The language of such a paper must, where there is any doubt as to its meaning, be construed strictly against the carrier.

The words "any article," in such paper, do not mean a trunk, or piece of baggage, and its entire contents, in gross, but mean any article contained in the piece of baggage.

Manuscript books, the property of a student, and necessary to the prosecution of his studies, are to be regarded as baggage.

(Before SHIPMAN, J., Southern District of New York, March 9th, 1868.)

THIS was an action at law, tried before the Court, without a jury. The facts are sufficiently stated in the opinion of the Court.

William C. Whitney, for the plaintiff.

Luke A. Lockwood, for the defendants.

SHIPMAN, J. The defendants constitute the Westcott Express Company, and are carriers, for the public, of freight

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and baggage, for hire, to and from any points in the city of New York. On the 1st of October, 1866, the plaintiff passed from his home in Massachusetts, over the Hudson River Railroad, to the city of New York, together with his trunk, for which he received the usual metallic check, which, on his arrival at New York, he delivered to the defendants, to enable them to obtain the trunk at the depot, and deliver the same at his residence in the city, no rate of compensation being named. The defendants obtained the trunk, but failed to deliver it to the plaintiff, it having been lost, in some way unknown to the defendants and to the plaintiff. Upon the delivery of the metallic check to the defendants, they delivered to the plaintiff a paper, upon which the number of the check was endorsed, and which contained, also, the following printed matter: "The Westcott Express Co. will not become liable for merchandise or jewelry contained in baggage received upon baggage checks, nor for loss by fire, nor for an amount exceeding one hundred dollars, upon any article, unless specially agreed for in writing, on this check receipt, and the extra risk paid therefor. * * * * And the owner hereby agrees that Westcott Express Co. shall be liable only as above." This printed matter the plaintiff did not read at the time it was delivered to him, nor till after notice, from the defendants, that his trunk was lost. The general custom of express companies is, to charge forty cents for every trunk, and twenty-five cents in addition for every \$100 of value beyond \$100. The defendant was ignorant of this custom. The defendant was a student at Columbia College, and was proceeding to New York, for the purpose of prosecuting his studies at that institution; and certain manuscript books, which formed part of the contents of his trunk, were necessary to the prosecution of his studies.

The discussion of this case, at bar, took a wide range, and a considerable number of the many cases, relating to the general question, how far, and in what manner, a carrier may limit or qualify the liability which the general rules of the common law impose upon him, were cited. I shall not

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here enter upon a review of the authorities touching this broad question. It has been remarked, by a learned and accurate writer, that "a common carrier may qualify his liability, by a general notice to all who may employ him, of any reasonable requisition to be observed on their part, in regard to the manner of delivery and entry of parcels, and the information to be given to him of their contents, the rates of freight, and the like; as, for example, that he will not be liable for goods above the value of a certain sum, unless they are entered as such, and paid for accordingly." (2 *Greenleaf's Ev.*, § 215.) But, in the case now before the Court, the defence does not rest upon a general notice, with constructive knowledge of which the plaintiff is to be charged, by proof that it was generally and widely promulgated. It rests on a special printed notice, put into the hands of the plaintiff, at the time he delivered his check to the defendants. It can make no difference that the plaintiff did not choose to read it until after he had notice that his trunk was lost. He received it at the time he parted with his check, it was legibly printed, and he must be charged with actual notice of its contents. By its terms, it qualified the duty or liability of the defendants, and limited their responsibility, in case of loss, to an amount not exceeding \$100 for any article, unless the plaintiff should disclose such articles, and have the fact endorsed on the paper, as well as pay for the extra risk. It excluded all liability for merchandise and jewelry. Though, as will be seen in the sequel, this point is of no practical importance in this suit, in view of the construction which I shall give to this notice, yet I am unwilling to leave it to be inferred that I entertain any doubt of the power of the carrier to qualify his responsibility by special notice, actually given to the owner, under circumstances like these. In *Orange Co. Bank v. Brown*, (9 *Wend.*, 85, 115,) Judge Nelson, speaking for the Court, says, of the carrier: "If he has given general notice that he will not be liable over a certain amount, unless the value is made known to him at the time of delivery, and a premium for insurance paid, such notice, if brought

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home to the knowledge of the owner, (and courts and juries are liberal in inferring such knowledge from the publication of the notice,) is as effectual, in qualifying the acceptance of the goods, as a special agreement, and the owner, at his peril, must disclose the value, and pay the premium." In the case before us, we are not left to a general notice, to be charged upon the plaintiff on the ground of its general publication, and which he might have forgotten, although he had seen it; but the notice was served upon him at the time he sought the services of the carrier. I can have no doubt, therefore, that the plaintiff was bound by the notice, and that the carrier incurred no responsibility which his notice, properly construed, excluded.

But here a more difficult question presents itself. The list of the contents of this trunk, and the value of each article thereof, are agreed to by the parties; and they amount, in the aggregate, to \$744.10. It was contended, on the argument, that the notice limited the liability of the carrier to \$100, unless a greater value was disclosed, and that, as no greater value was disclosed, judgment should be rendered for that sum only. But, so far from giving this notice a liberal construction in favor of the carrier, I am inclined to construe it strictly against him. The rule which holds carriers to strict responsibility is founded upon high considerations of public policy and the security of the property of travelers. Every limitation of this responsibility should be expressed, in each case, in clear and unequivocal terms. Notices of this character should, therefore, be construed strictly against the carrier. They are given to travelers of all ages and sexes, in the bustle of rapid transit from one place to another, in crowded vehicles and depots, and they should be free from all doubt or ambiguity, so that their contents may be clearly apprehended at a glance. Now, some portions of the defendants' notice in this case are clear and explicit. It declares that they will not be responsible for merchandise or jewelry contained in baggage received upon baggage checks. They do not choose to engage in the transportation of such articles

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as baggage, no matter what their value. They further give notice, that they will not be liable for losses by fire. Where there is no question of gross or willful neglect, or recklessness, or malfeasance or misfeasance, these restrictions, being plainly expressed, and communicated to the owner at the time of the engagement, are, without doubt, binding upon him. But, after designating merchandise and jewelry, and exempting them as well as losses by fire, the notice adds: "nor for an amount exceeding one hundred dollars upon *any article*, unless specially agreed for in writing on this check-receipt, and the extra risk paid therefor." The question arises, whether the term, "any article," refers to a trunk or piece of baggage, and its entire contents in gross, or whether it is to be confined to each separate article contained therein. In other words, does it limit the liability of the carrier for the loss of a trunk and its contents, or does it leave him liable for each article contained in the trunk, according to its value, not exceeding one hundred dollars for any single item. The terms "merchandise" and "jewelry" refer expressly to articles "contained in baggage received upon baggage checks," that is, to the contents of trunks or packages, and excludes liability upon the articles specified. When limiting the liability to one hundred dollars upon any one other article, I think it should be held also to refer to the separate contents of the trunks or packages, and not to the whole in gross. This strict construction is in harmony with the policy of the law, and essential to the protection of the community, in view of the constant devices of carriers to escape the responsibilities of their calling, while their eagerness to obtain the patronage of the public remains unabated. Now, I can well conceive, that they are unwilling to take the risks of carrying expensive articles of dress, such as costly furs, shawls, and other valuable paraphernalia of an extravagant modern wardrobe, a single item of which is often valued at many hundreds of dollars, without notice of value, and without pay for the risk. But, it may well be doubted, whether they intend, by such notices as the one under consideration, to apprise the owner that they decline

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all responsibility beyond one hundred dollars on each trunk and its contents, unless a special contract is made. A good trunk is worth half that sum, and often more, and the value of an ordinary traveler's trunk and necessary contents would usually exceed that sum. But, whatever be the intentions of carriers, such intentions must be so expressed as to leave no room for doubt as to their meaning, or they cannot be permitted to qualify their liability as fixed by the general rules of law applicable to their calling. As was remarked by Best, Ch. J., in *Brooke v. Pickwick* (4 Bing. 218): "If coach proprietors wish honestly to limit their responsibility, they ought to announce their terms to every individual who applies to their office, and, at the same time, to place in his hands a printed paper specifying the precise extent of their engagement." And, certainly, where they make no oral communication, but merely thrust into the hand of a traveler a small printed ticket, the notice which that contains should be explicit and leave nothing to be made out by construction. Where there is any doubt as to its meaning, it should be construed strictly, as against the carrier.

As to the general custom of express companies to charge extra for every package over one hundred dollars in value, I do not think that has any bearing on this case. Even admitting that they could change their liabilities by a sweeping custom, (which may well be doubted,) no price was demanded or named in this case, and, therefore, the custom has no bearing upon the controversy.

Among the contents of this trunk were five manuscript books, no one of which exceeded in value one hundred dollars; but the defendants insist that they are not liable at all for these, on the alleged ground that they cannot properly be termed baggage. In *Hawkins v. Hoffman*, (6 Hill, 586, 589,) Judge Bronson remarks: "An agreement to carry ordinary baggage may well be implied from the usual course of business; but the implication cannot be extended a single step beyond such things as the traveler usually has with him as a part of his baggage. It is, undoubtedly, difficult to de-

fine with accuracy what shall be deemed baggage, within the rule of the carrier's liability. I do not intend to say that the articles must be such as every man deems essential to his comfort; for, some men carry nothing, or very little, with them when they travel, while others consult their convenience by carrying many things. Nor do I mean to say that the rule is confined to wearing apparel, brushes, razors, writing apparatus and the like, which most persons deem indispensable. If one has books for his instruction or amusement by the way, or carries his gun or fishing tackle, they would undoubtedly fall within the term baggage, because they are usually carried as such. This, I think, a good test for determining what things fall within the rule." Now, it may safely be said, that books constitute to some extent a part of the baggage of every intelligent traveler. Especially is this the case with scholars, students, and members of the learned professions. There is no reason why they should not be under the protection of the law, as against the negligence of carriers, as well as any other portions of their baggage. But, it is said, that no case can be shown where the carrier has been held liable for manuscripts. No such case has been cited, and, in my researches, I have found none. But I see no reason for adopting a rule by which they should be excluded, under all circumstances, from the list of articles termed "baggage." With the lawyer going to a distant place to attend Court, with the author proceeding to his publisher's, with the lecturer traveling to the place where his engagement is to be fulfilled, manuscripts often form, though a small, yet an indispensable, part of his baggage. They are carried, as such, in his trunk or portmanteau, among his other necessary effects. They are indispensable to the object of his journey; and, as they are carried with his baggage, in accordance with universal custom, I see no reason why they should not be deemed as necessary a part of his baggage as his novel or his fishing tackle. In the present case, the manuscript books lost are admitted to have been necessary articles for the student at the institution to which he was proceeding. They must, under all the

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circumstances, be deemed to have been a part of his baggage, for which the defendants are liable.

There was one article of jewelry in the trunk, for which, of course, they are not responsible, as all jewelry was excepted by specific designation. This will, however, make no difference with the amount of the judgment, as, by the stipulation of the parties, it is not to exceed seven hundred dollars, the sum demanded in the declaration, and the aggregate of the agreed value is seven hundred and forty-four dollars and ten cents.

Let judgment be entered for the plaintiff, for seven hundred dollars, with costs.

THE UNITED STATES vs. JOHN DEVLIN.

No right to make a peremptory challenge to a juror exists, in the Circuit Court of the United States for the Eastern District of New York, on the part of a person on trial on an indictment for a misdemeanor.

The Act of July 20th, 1840, (*5 U. S. Stat. at Large*, 394,) does not confer such right.

The neglect or failure of an officer of the Internal Revenue to perform a duty required of him by law, does not relieve another person, who has violated the law, from the consequences of such violation.

In an indictment for a misdemeanor, several offences may be joined in different counts; and, when that is done, the prosecution cannot be compelled to elect between the several counts.

On the trial of an indictment under the Internal Revenue law, for having carried on business without a license, and without having paid a special tax, and for having failed to keep books required by law to be kept, the burden of proof is on the defendant to show that he had a license, and paid the special tax, and kept the books.

(Before BENEDICT, J., Eastern District of New York, March 14th, 1868.)

THIS was a motion for a new trial. The prisoner had been convicted on an indictment, charging him with offences against the Internal Revenue laws.

Benjamin F. Tracy, (*District Attorney*), for the United States.

William C. De Witt, for the prisoner.

BENEDICT, J. The application for a new trial is based on several grounds, the most important of which relates to the right of peremptory challenges in this Court, and will be first considered. The ruling of the Court on the trial was, that the offences charged against the prisoner were misdemeanors, and that, in such prosecutions, no right of peremptory challenge existed in this Court. The ruling was not made without consideration, and, having now again examined the question, in the light of the argument on this motion, I see no reason to change the opinion then formed. Although apparently doubted on the trial, the ruling that the offences charged were misdemeanors, has not been seriously questioned on the present motion. These offences are three in number, set forth in as many counts. The defendant is charged, first, with having carried on the business of a wholesale dealer without having taking out a license; second, with having carried on the same business after September, 1866, (when the law requiring a new registration and the payment of a special tax took effect,) without having paid the special tax; third, with having failed to keep the books which the law requires to be kept by wholesale dealers in liquors. No general statute of the United States exists according to which these offences can be declared felonies, nor are they declared to be such by the statute creating them, although there are offences in the same Act expressly designated such. They are not made punishable by hard labor, and a felonious intent is not made a part of the offence. In character, they are such that an intention to raise them to the rank of felony is not to be presumed, in the absence of any expressed indication of such an intention. A statute will not be construed to create a new felony, unless its express words or their necessary implication so require. (1 *Bishop's Crim. Law*, § 557.) The offences, then, are misdemeanors. If so, the right of peremptory challenge must be found conferred by some statute of the United States; for, at common law, no such right exists in such cases. (4 *Black. Comm.*, 353.) It has, accordingly, been argued, that, by the Act of Congress of July 20th, 1840, (5 *U. S. Stat. at Large*,

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394,) the State statute of 1847, which gives to a prisoner the right of peremptory challenge in the tribunals of the State, is made, in effect, a statute of the United States and available as conferring such right in this Court. But, although it is true, that, under the State Act of 1847, the right in question exists in the tribunals of the State, I am unable to see how the language of the United States statute of 1840 can, by any fair construction, be considered as giving effect to that Act in this Court. The words of the Act are as follows: "Jurors to serve in the Courts of the United States in each State respectively, shall have the like qualifications, and be entitled to the like exemptions, as jurors of the highest Court of law of such State now have, and are entitled to, and shall hereafter, from time to time, have and be entitled to, and shall be designated by ballot, lot, or otherwise, according to the mode of forming such juries now practised, and hereafter to be practised therein, in so far as such mode may be practicable by the Courts of the United States, or the officers thereof." These words seem to me clearly to confine the Act to the subject of the qualifications of persons to serve as jurymen, and their exemptions from that duty, and in no wise to relate to the right to a peremptory challenge, which is the setting aside a jurymen without regard to his qualification or exemption. Such was the construction placed upon this Act, in 1851, by Mr. Justice Nelson, in the case of *The United States v. Douglass*, (2 *Blatchf. C. C. R.*, 207, 210,) and, the decision of the Supreme Court in the case of *The United States v. Shackelford*, (18 *How.*, 588,) is to the same effect. This last case brought up, on a certificate of division, the question of the right to peremptory challenges, in a prosecution for a misdemeanor in Kentucky, and the determination of the Court, as I understand it, was, that, by virtue of the latter portion of the Act of 1840, the Courts of the United States are empowered to adopt, by rule, an existing State statute upon the subject of peremptory challenges, but that, in the absence of any such adoption by rule, the right to a peremptory challenge, in a prosecution for a misdemeanor, could not be held to exist, either under the

common law, or under a law of the State not so adopted by the Court. The point in question is thus settled adversely to the prisoner by authority; for, in this Court, the State Act of 1847 has never been adopted by rule or in practice, nor has that Act, to my knowledge, been adopted in any of the Courts of this Circuit.

The next question to be considered relates to the rulings of the Court in excluding certain offers of evidence made by the defence. These offers are based upon the proposition, that the citizen and the officer of the revenue bear such a relation to each other, in regard to the law, that the neglect or failure of the officer to perform the duties which the law requires of him, relieves the citizen from the obligations which the law imposes upon him. The proposition is manifestly unsound. To maintain it would be to hold, that a revenue officer, by failing to obey or enforce a law, could destroy the law. It would be, in effect, to transfer to officers of the revenue the law-making power, and would enable them to make the law binding upon those only whom they might desire to have bound. This cannot be. The officers may, or may not, comply with the law, but the law exists, nevertheless, in full force, and visits with its punishment both the citizen and the officer, when they are shown to have disregarded its requirements. These views are not new, but have been repeatedly expressed by Courts, in disposing of defences based upon the same theory now advanced on behalf of this prisoner. (*Commonwealth v. Blackington, Shaw, Ch. J.*, 24 *Pick.*, 352; *Lord v. Jones, Shepley, J.*, 24 *Maine*, 439, 442; *Mayor v. Mason*, 4 *E. D. Smith*, 142, 145, *Woodruff, J.*) If, then, it were true that the failure of an assistant assessor to register the application of the prisoner, prevented him from obtaining a license from the collector, that would not make it lawful for him to proceed without a license. The refusal to grant a license is not equivalent to a license. So, too, if it be true, as appears from the papers offered in evidence, that, after the commission of the offence here charged, and after the prisoner had been arrested, and

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these very offences had, to some extent, been judicially examined into, the officers of the Internal Revenue accepted from him an application for a license, and received from him the amount of the special tax, this proceeding on the part of the prisoner does not tend to show that he had a license at the time in question, or had paid his special tax before he proceeded to do business; nor did the action of the officers work out a pardon for the offences thus previously committed. Neither the law-making power, nor the pardoning power, has been entrusted to the collectors and assessors of the Internal Revenue.

The next question raised is based upon the refusal of the Court to compel the prosecution to elect between the several counts in the indictment. On this point it is only necessary to say, that an examination of the text-books will show it to be well settled that, in cases of misdemeanor, several offences may be joined in different counts, and that there is no right, in such cases, to compel the prosecution to rely on one transaction. (1 *Bishop's Crim. Law*, §§ 209, 212.)

One other point has been taken on this motion, and that relates to the charge to the jury, that the burden rested on the prisoner to show that he had taken out a license, and had paid the special tax, and had kept the books required by the law. On this point it must first be noticed, that no exception was taken to this portion of the charge, nor was it objected to at the trial. Therefore, the point cannot be properly raised on this motion. But, without intending, in any degree, to countenance the practice of omitting to object at the time to portions of a charge supposed to be erroneous, I may add, that the charge could only have been understood to be declaratory of the law of the case as it stood on the evidence, and not to be the announcement of an abstract proposition. That it correctly declared the law of the case is not to be disputed; for, there was, in the case, positive evidence, from the prisoner's own clerk, that the books were not kept, and, also, evidence going to show that no license had been issued to the prisoner, and that no special tax had been paid

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by him. But, I apprehend that, considered as an abstract proposition, it will be found to be correct in principle and sustained by authority. Thus, in *The State v. Gewing*, (1 *McCord*, 573,) which was an indictment for selling liquor without a license, the Court, upon appeal, say: "It is the opinion of the Court, that the burthen of the proof lay on the defendant, and that it was incumbent on him to show that he had been licensed to retail, a fact which, if it existed, could easily have been made to appear, by the adduction of his license." So, also, in *Wheat v. The State*, (6 *Missouri*, 455,) which was an indictment for keeping a ferry without a license, it was held, that the burden was on the defendant to show that he had a license, without the State offering any evidence to show the contrary.

I have now considered all the points raised on the part of the defence on this motion, and the result is, that no good ground for a new trial has been shown. The motion for a new trial must, therefore, be denied.

THE UNITED STATES vs. JOHN B. ADDATTE.

Where one of two defendants, in a joint indictment against the two, is tried separately, the wife of the defendant who is not on trial, is a competent witness for the defendant who is so tried separately.

(Before BENEDICT, J., Eastern District of New York, March 14th, 1868.)

THIS was an indictment against the prisoner, jointly with another person, for counterfeiting the currency. The other defendant not being in custody, the case went to trial against the prisoner, separately. On the trial, the wife of the other defendant was offered as a witness for the prisoner, and, on objection, was excluded. The prisoner having been convicted, a motion was now made for a new trial, on the ground of error in such ruling.

BENEDICT, J. I am of the opinion that the ruling at the trial was wrong, and that the witness was improperly ex-

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cluded. On examining the question, I find the rule to be, that, when trials are separate, the wife may testify in favor of or against any one other than her husband, except in cases where the acquittal of one defendant works the acquittal of the rest, as in cases of conspiracy, and the like. It is not contended, in this case, that the acquittal of the prisoner would work the acquittal of the other defendant, and the wife of the latter was, therefore, a competent witness.

• The motion for a new trial is granted.

AUSTIN MYERS vs. FRANK S. DAVIS.

The proper form of a declaration, in an action of assumpsit, in this Court, commented on.

A count in such a declaration, alleging a sale and delivery of property by a third party to the defendant, an agreement by the defendant to pay such third party so much money therefor, and an assignment of the claim of such third party to the plaintiff, but not alleging that the defendant ever undertook or promised the plaintiff to pay to him the whole or any part of the claim, is bad, on general demurrer.

A count in such a declaration, alleging a sale of property by the plaintiff and a third party to the defendant, for so much money, and an agreement by the defendant to pay that sum therefor, but not alleging that the promise was to pay at any specified time, or on demand or request, and alleging that the defendant had not paid any part thereof to the plaintiff or to such third party, that such third party assigned his interest in the demand to the plaintiff, and that the defendant, in consideration of the premises, promised to pay such money to the plaintiff, but not alleging that the defendant promised the plaintiff, or that the promise was to pay at any particular time, or on demand or request, and not alleging any other consideration for the promise, or any request or refusal to pay, is bad, on general demurrer.

Another count in such a declaration, held bad, on general demurrer, and its defects pointed out.

(Before HALL, J., Northern District of New York, March 19th, 1868.)

THIS case came before the Court on a general demurrer to the third, fourth and sixth so-called counts of a pleading, on the part of the plaintiff, in a suit at law, which the defendant, in his demurrer, treated as a declaration.

HALL, J. The plaintiff's pleading, so far as it can be said to have form or comeliness, is probably in the form of a complaint under the New York Code of Procedure; and, if it has, in some respects, the substance of a proper pleading in this Court, it may properly be considered as belonging to the same class of misbegotten and ill-shaped hybrids with the pleading I had occasion to remark upon in the case of *Birdsall v. Perego*, decided at the October term, 1865.

If the demurrer, in this case, had been special, and had properly alleged the want of form of the pleading demurred to, as a pleading in this Court, a single glance at the pleading itself would have been sufficient to justify the Court in declaring that the whole declaration was clearly bad. But the demurrer is not special, and a somewhat careful examination has been given to so much of the plaintiff's pleading as is covered by the demurrer.

The pleading demurred to has not the proper form of a declaration in either of the several forms of action which are sustainable on the law side of this Court. The plaintiff's case required a declaration in assumpsit, and the pleading demurred to approaches more nearly to a declaration in assumpsit than to any other legitimate form of pleading, and its sufficiency must, therefore, be maintained, if at all, on the ground that the three several parts of the plaintiff's pleading to which the demurrer applies, are sufficient, in substance, as counts in assumpsit, under the rules of pleading which obtain in this Court. It is in that light that I shall consider the questions raised by the demurrer.

The statement of the cause of action thirdly alleged, is bad, in substance, for the reason, among others, that it alleges a sale and delivery of stock by one Hagar to the defendant, an agreement by the defendant to pay Hagar \$3,300 therefor, and a subsequent sale and assignment of this claim of Hagar's to the plaintiff, without alleging that the defendant ever undertook or promised the plaintiff to pay to him the whole or any part of the claim.

The statement of the cause of action fourthly alleged, is bad, in substance, for a different cause. It alleges a sale of

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stock, by the plaintiff and Hagar, to the defendant, for the price of \$7,000, and an agreement, by the defendant, to pay that sum therefor, but without alleging that the promise was to pay at any specified time, or on demand or request; that the defendant had not paid any part thereof to the plaintiff, or to Hagar; that Hagar, for a valuable consideration, transferred and assigned his interest in said demand to the plaintiff; and that the defendant afterward, and before the commencement of the suit, "in consideration of the premises respectively, promised to pay the said sum of \$7,000 to the plaintiff," without alleging that "the defendant undertook and promised the plaintiff," &c., or that the promise was to pay at any particular time, or on demand or request, and without alleging any other consideration for the promise, or any request or refusal to pay. The undertaking and promise of the defendant should have been alleged to have been made to the plaintiff, and the pleading should have alleged a promise or undertaking to pay on request, or at a specified time, and then have alleged, in proper terms, the non-performance of such promise or undertaking.

The statement of the cause of action sixthly made in the declaration, is bad, in substance, for the reason that there is a failure to set forth an undertaking or promise, and its non-performance, in such manner as to show a right of action, these defects being similar to those already referred to in respect to the cause of action fifthly stated. It is bad, also, because it does not state why, or how, the plaintiff and Hagar sustained damages, or sufficiently show that the damages claimed are the legal consequence of the suspension of work, or that the defendant undertook, or promised, to pay such damages, the alleged promise "to pay the said several sums of money respectively to the plaintiff," not being an allegation of a promise to pay damages the amount of which had only been stated in one single aggregate sum of \$10,000.

The defendant must have judgment on the demurrer, with leave to the plaintiff to amend his declaration, and the several counts therein, within twenty days, on payment of costs.

The Fuzzard Wadding Manufacturing Company v. Dickinson.

THE FUZZARD WADDING MANUFACTURING COMPANY

v8.

THOMAS N. DICKINSON AND OTHERS. IN EQUITY.

The claim, in the reissued letters patent granted to William Fuzzard and James Hatch, April 5th, 1864, to "the employment or use of a heated metallic cylinder, B, or one having a metallic exterior or periphery, in combination with a heated pressure cylinder, C, one or more, and a polishing roller, G, or its equivalent, arranged as shown, for the purpose of surfacing and drying simultaneously, or at one operation, fibrous materials, as set forth," is not infringed by the use of a machine which employs a pressure roller that is not heated, and is not constructed so as to be heated, in any particular way.

(Before SHIPMAN, J., Connecticut, April 3d, 1868.)

THIS was a final hearing, on pleadings and proofs, on a bill for an injunction and an account, founded on letters patent, reissued to William Fuzzard and James Hatch, and dated April 5th, 1864. The alleged invention was made by Fuzzard. The patent was assigned to the plaintiffs, a corporation organized under the laws of Massachusetts.

SHIPMAN, J. The defendants, who are engaged, like the plaintiffs, in the manufacture of wadding, are charged in the bill with infringing the rights of the plaintiffs secured by this patent. The character of the machine used by the defendants is clearly proved, and, in order to determine whether or not it embraces the invention of Fuzzard, we must look into the specification and claim of the patent and see what is there set forth as such invention.

The object of the alleged new device is described, in the body of the specification, to be "for applying a glazing or size to fibrous substances, such as cotton, wadding, &c., in such a manner that a quite thin or attenuated sizing may be used and applied to the web or material to be glazed, sized,

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or "surfaced," as it is technically termed, and said material dried at the same operation. * * * To this end the invention consists in the employment and use of a smooth or polished metal cylinder, heated by steam, or otherwise, over a portion of which the web to be surfaced passes, and of a heated pressure roller bearing against the web upon the metal cylinder, the cylinder or web having the glazing or size previously distributed upon it by means of a revolving brush, or its equivalent, as hereinafter set forth."

The machine is very simple, and may be briefly described as follows: First, a solid frame of suitable dimensions, near the central part of which is placed a hollow metal cylinder, of large size. This cylinder revolves upon a hollow shaft, the ends of which rest upon the two sides of the frame, and is heated usually by steam. The web to be sized is placed on a common roller at one end of the frame, and is, during the operation of the machine, made to pass over the upper portion of the cylinder, and off on to another roller, which receives it as it leaves the cylinder. Between the roller from which the web is taken to the cylinder, and the cylinder itself, and very close to the latter, is a small heated pressure roller, between which and the cylinder the web passes, and by which it is pressed into close contact with the cylinder. The sheet of web passes under this pressure roller and over the cylinder, and the former is so adjusted as to give the degree of pressure required. Underneath the cylinder there is a roller, attached to the frame, and made to revolve in contact with the cylinder. This is called a polishing roller. It has a surface of felt, or some other suitable material, and, as it revolves, with its surface in contact with the surface of the revolving cylinder, it cleans and polishes the latter. Between the point where this polishing roller and the cylinder come in contact, and the point on the cylinder where the web first reaches it, there is a size trough, in which another roller wallows, carrying the size into contact with a revolving brush, which takes it up and distributes it on the surface of the cylinder. The different parts of the machine are rotated in the usual way,

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by cog-wheels and endless aprons. When the machine is in motion, the size is thrown on the surface of the cylinder, (or it may be thrown on the under surface of the web, or on both that and the cylinder,) and the web passes under the pressure roller, on to, and in close contact with, the cylinder, from which it is peeled off at a point nearly opposite from where it is taken on, and wound on the roller which receives it after the sizing and glazing are completed. By this combined operation of the machine, sheets or webs of very slight strength or toughness are run through and glazed with a smooth surface.

I have thus given a description of the material parts of the machine and its mode of operation, without designating the parts by letters referring to the drawings. But, as these letters are introduced into the claim, it will be well, before citing that, to say, that the large heated cylinder is designated as B, the small heated pressure roller as C, and the polishing roller as G. The claim is as follows: "The employment or use of a heated metallic cylinder, B, or one having a metallic exterior or periphery, in combination with a heated pressure cylinder, C, one or more, and a polishing roller, G, or its equivalent, arranged as shown, for the purpose of surfacing and drying simultaneously, or at one operation, fibrous materials, as set forth." There is a further claim touching the operation of the revolving brush, but that is not in controversy here.

Now, the frame and large cylinder of the defendants' machine are like those of the plaintiffs'. The defendants also use a pressure roller, which presses the web into contact with the cylinder. In place of the polishing roller of the plaintiffs, the defendants use a clearing bar, placed across the frame, and very nearly in contact with the cylinder. As the cylinder revolves, this bar catches, and takes from its surface, any portion of the wadding that may have adhered to it. A packing is thus soon formed between the clearing bar and cylinder, which wipes, and, to some extent, cleans the latter, as it revolves. It can hardly be said to polish it, though, for the purposes of this case, we may assume that it does.

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By recurring to the description of the plaintiffs' invention, it will be seen, that it consists of three elements in combination, namely, a heated metallic cylinder, a heated pressure roller, and a polishing roller. The question now presents itself, whether the defendants use the same elements, or their equivalents, in combination. If they do, they infringe the rights secured by the plaintiffs' patent. If they do not, then they do not infringe. The defendants' cylinder is the same as that of the plaintiffs, and we will assume, for the purposes of this case, that their clearing bar is an equivalent for the plaintiffs' polishing roller, though that may well be doubted. We have, then, two elements of the invention in combination. But the third is equally essential to the infringement. This third element is the pressure roller. In the specification it is described as a small metallic cylinder, and, in that, as well as in the claim, it is described as a "heated pressure roller" or cylinder. This heated pressure roller is described, in the body of the specification, as performing two functions, namely, drying and pressure. "The cylinder C," the pressure roller, "being also heated, dries off the steam that passes through the web at this point"—the point of contact of the web with the main cylinder—"and the web, passing over the upper part of the cylinder B, is glazed, or sized, and dried, the two processes being performed simultaneously, and finished before the web reaches the point where it leaves the cylinder B. The cylinder C," the pressure roller, "also presses the web to the cylinder B, and causes it to adhere to the glazing or sizing on cylinder B. One or more of these cylinders, C, may be used." Now, the defendants use, for a pressure roller, a common solid wooden cylinder, not only not heated, but not constructed so as to be heated in any particular way. The only function that it performs is to press the web into contact with the large metal cylinder, in order to make the sizing adhere to and glaze the surface of the sheet of wadding. But, I am asked to hold that this roller of the defendants is the equivalent of the heated pressure roller of the plaintiffs. This cannot be done, under any reasonable rule of construction.

The patentees do not, either in the body of their specification, or in their claim, assert their exclusive right to any combination except one in which the heated pressure roller forms one of the essential elements. Wherever they describe their roller, they call it a heated roller, and, in setting forth its functions, they describe it as drying off the steam which passes through the web. It is true, that they also say that it performs the other function of pressing the web against the cylinder. But they nowhere intimate that they claim this roller when it is so constructed and used as to perform only the duty of pressure. It is clear to my mind, in view of the state of the art, that they deemed it essential to the validity of their patent, that the element of heat should characterize and qualify this member of the combination. In some branches of the wadding manufacture, the ordinary non-heated roller is nearly or quite as useful as the heated roller described in the patent; and this must have been perfectly obvious to the inventor, who was well acquainted with the state of the art. It is incredible that, with this fact before him, he should have omitted to claim simply a pressure roller, whether heated or not, had he deemed it within the scope of his invention. But, whether this is so or not, the specification and claim are so drawn as fairly to exclude the idea that any except a heated pressure roller was intended to be claimed. If Fuzzard was the first and original inventor of the combination of cylinder, polishing roller, and pressure roller, whether heated or not, the specification should have so described and claimed it. As it does not, either expressly or by fair inference, this suit fails, for the defendants do not use the combination described and claimed in the patent.

The bill must, therefore, be dismissed, with costs.

Hodge v. The Hudson River Railroad Company.

AMELIA S. HODGE AND ZELIA C. HODGE, AS ADMINISTRAT-
TRICES, &C., OF NEHEMIAH HODGE, DECEASED,

v8.

THE HUDSON RIVER RAILROAD COMPANY.

THE SAME

v8.

THE NEW YORK AND HARLEM RAILROAD COMPANY.
IN EQUITY.

By reason of the provisions of the 6th section of the Act of April 8d, 1818, (3 *U. S. Stat. at Large*, 415,) the Circuit Court for the Southern District of New York has no original jurisdiction of a suit in equity, founded on letters patent, for infringements thereof which occurred within the Northern District of New York.

A license granted under letters patent for a railroad car brake, to a railroad company, to construct and use the invention "on any and all cars belonging to said company, and to use the same improvement upon the entire length of their road, and upon all parts thereof * * * for and during the term for which said letters patent are or may be granted," covers the use of brakes belonging to the company, attached to trucks and running gear belonging to them, even though the superstructures which are borne upon the trucks do not belong to the company.

Such license does not convey the right to use the brake during an extended term of the patent, granted after the making of the license.

The only right which the company, as a lawful licensee under the patent, for the first term, of the right to use the thing patented, has, under such extended term, is the right given to it by the 18th section of the Act of July 4th, 1836, (5 *U. S. Stat. at Large*, 125,) to continue to use until they are worn out, or as long as they can be repaired, such brakes as they had lawfully in use under the license when the first term of the patent expired.

A railroad company, in running its cars on the railroad of another company, under a permission to that effect, cannot be considered as operating such railroad, within the meaning of a license granting to the latter company, "and any and all other parties that may hereafter own or operate" such railroad, the right to construct and use a patented invention "on any and all cars now or hereafter owned by said company, or by parties that may hereafter own or operate" said railroad.

(Before BLATCHFORD, J., Southern District of New York, April 8th, 1868.)

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THIS was a motion for a provisional injunction, made in each one of two suits, to restrain the infringement of letters patent for an "improvement in the mode of operating brakes for cars," issued to Nehemiah Hodge, October 2d, 1849, reissued to him March 1st, 1853, and extended to him September 16th, 1863, for seven years from October 2d, 1863.

Samuel D. Cozzens, for the plaintiffs.

Charles A. Rapallo, for the defendants.

BLATCHFORD, J. The motion in the suit against the Hudson River Railroad Company will be first considered. The several acts of infringement alleged in that suit are: (1) The running, by the Hudson River Railroad Company, between East Albany and Troy, of cars belonging to the New York and Harlem Railroad Company, provided with infringing brakes; (2) The running, by the Hudson River Railroad Company, across the bridge of the Hudson River Bridge Company, at Albany, of cars belonging to the Hudson River Railroad Company, containing infringing brakes; (3) The running, by the Hudson River Railroad Company, upon their own railroad, at or near Peekskill, in the Southern District of New York, of cars marked "New York, Sus. Bridge & Buffalo," and of cars known as sleeping cars and drawing-room cars, containing infringing brakes, which cars are alleged not to have belonged to the Hudson River Railroad Company; (4) The running, by the Hudson River Railroad Company, on the tracks of the Troy and Greenbush Railroad Company, and on the tracks of the Troy Union Railroad Company, of cars belonging to the Hudson River Railroad Company, containing infringing brakes; (5) The running, by the Hudson River Railroad Company, on their railroad, of freight cars, not belonging to themselves, known as the "White Line," containing infringing brakes (it being assumed that such running was within this District); (6) The operat-

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ing, by the Hudson River Railroad Company, of cars of the "Blue Line," not belonging to themselves (it being assumed that such operating was on the railroad of said company, and within this District.)

The first, second and fourth alleged infringements occurred within the Northern District of New York. The causes of action growing therefrom arose, therefore, within that District, and, under the provisions of the sixth section of the Act of April 3d, 1818, (3 *U. S. Stat. at Large*, 415,) this Court has no original jurisdiction of such causes of action.

In regard to so much of the third alleged infringement as relates to cars marked "New York, Sus. Bridge and Buffalo," and in regard to the fifth and sixth alleged infringements, the Hudson River Railroad Company show that they own, and run upon their road, cars marked "New York, Sus. Bridge and Buffalo," and also freight cars known as "White Line" cars, and "Blue Line" cars, and that they cannot say whether the cars so marked, referred to in the affidavit on the part of the plaintiffs, were the cars of the Hudson River Railroad Company or not. If the cars referred to did not belong to the Hudson River Railroad Company, it is for the plaintiffs to show the fact affirmatively, or else, on the evidence, it must be assumed that such cars did belong to that company. The plaintiffs have not shown that such cars did not belong to that company. They should have designated the particular cars by numbers, or other sufficient description, so as to have required and enabled the defendants to show whether such cars were or were not their property. In regard to so much of the third alleged infringement as relates to cars known as sleeping cars and drawing-room cars, the Hudson River Railroad Company show that the trucks and running gear, including the brakes, of such cars, belong to that company.

The only question for consideration, therefore, is, whether the company, by using the patented brake, within this District, on their own railroad, on cars belonging to them, marked "New York, Sus. Bridge and Buffalo," and on cars belonging to them known as "White Line" cars, and on cars belonging

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to them known as "Blue Line" cars, and by using the patented brake, within this District, on their own railroad, on sleeping cars and drawing-room cars, the brakes, trucks, and running-gear of which cars belonged to them, have infringed the patent in question, as extended. It is understood, that all the alleged infringements set up occurred in November, 1867, and therefore since the extension of the patent. The company justify such use, under a license granted to them by the patentee, April 8th, 1862, whereby he licenses them "to construct and use said improvement on any and all cars belonging to said company, and to use the same improvement upon the entire length of their road, and upon all parts thereof, extending from the city of New York, in the State of New York, to the city of Troy, in said State, for and during the term for which said letters patent are or may be granted." Brakes belonging to the company, attached to trucks and running-gear belonging to them, and so used, are, undoubtedly, within the meaning of the license, used on cars belonging to the company, even though the superstructures which are borne upon the trucks do not belong to the company. The license, therefore, covers all that has been thus done by the company, that is, the use of the patented improvement on cars belonging to the company, on their own railroad, so far as the extent of their acts is concerned. As to the duration of the license, nothing is said, in the license, about an extension of the patent. The license is to continue "for and during the term for which said letters patent are or may be granted." The first question that arises is, as to the meaning of these words, "may be," and whether they refer to or can be construed to include an extended term of the patent. I do not think there is any thing in the license to indicate that the parties to it had at all in view a continuance of the license during any extended term of the patent. The provision that the license is to continue "during *the term* for which *said* letters patent are or *may be* granted," is satisfied by holding it to apply exclusively to a reissue of the patent. There is nothing in the language which makes it exclusively or even necessarily appli-

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cable to an extension. The presumption of law in regard to every license under a patent is, that the parties deal in regard only to the term existing when the license is given, unless an express provision is inserted looking to a further interest. (*Wilson v. Rousseau*, 4 *How.*, 646, 685, 686.) Unless there be such a stipulation, showing that the parties contemplated an extension, the Court is bound to construe the instrument, in each and all of its provisions, as relating to the then existing term only. (*Gibson v. Cook*, 2 *Blatchf. C. C. R.*, 144, 146.) The language of the license in the present case is very different from the language of the instrument in the case of *Phelps v. Comstock*, (4 *McLean*, 353.) In that case, the language was, "to the full end of the *term or terms* for which *letters patent* are or may be granted for said improvements." The Court held that that language embraced any subsequent extension of the patent. So, also, in *Case v. Redfield*, (4 *McLean*, 526,) where the Court held that the language of the instrument embraced an extension, the language was, "all the right, title, and interest * * * in said invention and improvement, as secured * * * by said letters patent, for the whole of the United States, * * * for which *letters patent* were or may be granted for said improvements." In *Clum v. Brewer*, (2 *Curtis' C. C. R.*, 506, 508,) where the Court held that the parties intended to cover an interest in any extension, the language was, "one undivided fourth part of my said invention, and of all my rights and property therein, secured by my said caveat or otherwise, that I have or may have from *any letters patent* for the same, granted by the Government of the United States and within the limits thereof." In *Pitts v. Hall*, (3 *Blatchf. C. C. R.*, 201,) where the Court held that there was no doubt that the parties intended, by the language used, to refer to and provide for an extension, the language to that effect was clear and unambiguous. In all four of the cases referred to, the instrument under consideration was one purporting to convey, by assignment or grant, an interest in the invention patented, and an interest in the entire right granted by the existing patent to

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make and use and vend to others to be used the invention patented. As Mr. Justice Curtis says, in *Clum v. Brewer*, (p. 521,) "where the invention is the subject sold, it would be natural to expect to find, in the instrument of sale, something showing an intention that the purchaser should be interested, not merely in the original letters patent, but in any extension thereof, securing the exclusive right to the same invention which was the subject of the sale." In the present case, neither the invention, nor any interest in it, nor any interest in the entire right covered by the patent, was granted, but merely a license to use the invention, and to construct brakes containing it for such use, on certain cars, on a certain railroad, and such license is to continue "during *the term* for which *said* letters patent are or may be granted." *The term* for which *said* letters patent, that is, the letters patent granted October 2d, 1849, and reissued March 1st, 1853, were granted, or might be granted, was a term ending October 2d, 1863. It is impossible, on any fair construction of the language, and in view of the adjudged cases, to hold that the license was intended by the parties to cover an extended term of the patent.

There being, then, in this case, no express stipulation carrying the license into the extended term, the only right which the Hudson River Railroad Company possesses, under the extended term, is that which is given to it by the clause of the 18th section of the Act of July 4th, 1836, (5 *U. S. Stat. at Large*, 125,) which provides that the benefit of the extension of a patent shall "extend to assignees and grantees of the right to use the thing patented to the extent of their respective interest therein." As the thing patented in the present case is a machine, the law is entirely settled, that the only right which the company, as a lawful licensee under the patent, for the first term, of the right to use the thing patented, acquired under the extended term, by virtue of that clause in the 18th section, is the right to continue to use, until they are worn out, or as long as they can be repaired, such brakes as they had lawfully in use, under said license, on the 2d of October, 1863. (*Wilson v. Rousseau*, 4 *Howard*,

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646; *Bloomer v. McQuewan*, 14 *Howard*, 539; *Chaffee v. The Boston Belting Co.*, 22 *Howard*, 217; *Bloomer v. Millinger*, 1 *Wallace*, 340.) As it is not shown in the papers whether the particular brakes used by the company since the 2d of October, 1863, on their own railroad, on cars belonging to them, marked "New York, Sus. Bridge and Buffalo," and on cars belonging to them known as "White Line" cars, and on cars belonging to them known as "Blue Line" cars, and on sleeping cars and drawing-room cars, the brakes, trucks, and running gear of which cars belonged to them, were, or were not, lawfully in use under said license on the 2d of October, 1863, it is impossible for this Court to decide whether the plaintiffs are, or are not, entitled to an injunction, as respects those particular brakes. The decision of the motion, as regards the Hudson River Railroad Company is, therefore, suspended, to allow the plaintiffs to supply evidence on this point, and with leave to them to do so on notice to the company.

The several acts of infringement set forth in the suit against the New York and Harlem Railroad Company are: (1) The running, by the New York and Harlem Railroad Company, upon their own railroad, at or near Bedford, in the Southern District of New York, of freight cars belonging to the Hudson River Railroad Company, containing infringing brakes; (2) The running on the tracks of the New York and Harlem Railroad Company, of cars belonging to the New York and New Haven Railroad Company, containing infringing brakes, (it being assumed that such running was within this District.) The alleged infringements occurred in November, 1867, and January, 1868. The New York and Harlem Railroad Company set up, in defence, that no freight cars of the Hudson River Railroad Company have been used by the New York and Harlem Railroad Company, except such cars as were caused by the former company to be run over the railroad of the latter company, and in which running and use both of the companies were interested, and from which running and use both of the companies derived pecuniary profit; and that the cars of the New York and New Ha-

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ven Railroad Company have been run by that company over a portion of the track of the New York and Harlem Railroad Company, under an agreement between the two companies, giving to the former company the privilege of running its cars on the track of the latter company, and that the cars in question were run by the former company under that agreement. To justify such use, the New York and Harlem Railroad Company set up three licenses under the patent, granted by the patentee, one to the New York and Harlem Railroad Company, one to the Hudson River Railroad Company, and one to the New York and New Haven Railroad Company.

The license to the New York and Harlem Railroad Company was granted on the 1st of June, 1864, after the extension. It recites the fact that the patent had been extended, and that the company "desire the right and license to construct and use said improvement anew and subsequent to the date of, and during the term of, said extension, as well on cars which may be built or purchased by said company subsequent to the date of said extension, as upon cars not fitted up with said improvement before the date of said extension," and then licenses "said company, and any and all other parties that may hereafter own or operate the said New York and Harlem Railroad, to construct and use said improvement anew on any and all cars now, or hereafter, owned by said company, or by parties that may hereafter own or operate said New York and Harlem Railroad, all such construction and use to extend to and over the said New York and Harlem Railroad, and on, to, and over, the roads where said cars may be employed or run on joint business." This license extends only to cars owned by the New York and Harlem Railroad Company. It does not extend to cars belonging to the Hudson River Railroad Company, or to cars belonging to the New York and New Haven Railroad Company. The New York and New Haven Railroad Company cannot properly be considered, within the meaning of the license, as operating the New York and Harlem Railroad, in

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running their own cars on that road, under a permission to that effect. Therefore, the license to the New York and Harlem Railroad Company does not authorize the use on its road of the brakes which are on the freight cars in question belonging to the Hudson River Railroad Company.

The license to the Hudson River Railroad Company, which is set up to justify the use, since the 2d of October, 1863, by the New York and Harlem Railroad Company, on its own road, of freight cars which belong to the Hudson River Railroad Company, and which the latter company causes to be run over the road of the former company, and in the running and use of which both of the companies are interested, and from the running and use of which both of the companies derive pecuniary profit, is the same license to the Hudson River Railroad Company, dated April 8th, 1862, which has been before referred to, and the provisions of which have been considered in reference to the motion for an injunction against that company. In addition to the clauses before mentioned, the following provision is contained in the license: "I also further authorize and license said company to run, or cause to be run, their said cars, with said improvement thereon, on and over other roads, on joint business, during the term above stated." This provision, while it is broad enough to cover the use in question of the cars of the Hudson River Railroad Company, on the road of the New York and Harlem Railroad Company, during the first term of the patent, is limited to that term, and does not run into the extended term. There is nothing in this license to justify the use complained of since the extension. Such use must be upheld, if at all, by showing that the brakes on the cars belonging to the Hudson River Railroad Company, which that company have caused to be run on the road of the New York and Harlem Railroad Company, on joint business, since the extension, were brakes lawfully in use on the 2d of October, 1863. No evidence is furnished on which the Court can decide this point as to those brakes, and the motion in that respect is suspended, to allow the evidence to be supplied.

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The license to the New York and New Haven Railroad Company, which is set up to justify the running by that company of its own cars on the tracks of the New York and Harlem Railroad Company, by the permission of the latter company, is dated April 22d, 1864. It recites the extension, and the fact that the company "desire the right and license to construct and use said improvement anew and subsequent to the date of, and during the term of, said extension, as well on new cars which may be built or purchased by said company subsequent to the date of such extension, as upon cars not fitted up with said improvement before the date of such extension," and then licenses the company "to construct and use said improvement anew, on any cars belonging to them, and during the term of said extension, and not included by law in the former license given by me to said company." The license was then signed by the patentee and witnessed, and had the proper internal revenue stamp affixed. The following clause was then added, and signed by the patentee, and witnessed and stamped, bearing the same date with the license which preceded it—April 22d, 1864: "And it is hereby further agreed and understood, that said New York and New Haven Railroad Company are authorized, under the foregoing license, to run their said cars, with said improvements in use thereon, on and over any and all other railroads, wherever their business leads them, and to receive upon and use on their own road the cars of any other railroad company, with said improvement in use thereon, without any further claim for compensation from me, or from any person under me, whatsoever, all of which privileges are to extend through the term of said extension, and any subsequent extension, and furthermore through all future time." This additional clause manifestly gives to the New York and New Haven Railroad Company the right, during the extension, to run their own cars, with the patented brake on them, on and over the road of the New York and Harlem Railroad Company, provided the legitimate business of the former company leads them to do so. It is shown, on the part of the defendants, that the cars of the New

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York and New Haven Railroad Company which are complained of as having been run on the tracks of the New York and Harlem Railroad Company, have been so run by the former company under an agreement between the two companies, giving to the former company the privilege of running its cars on the track of the latter company; and it is not denied by the plaintiffs, that the legitimate business of the former company led them to so run the particular cars in question. The motion for an injunction is, therefore, denied, so far as regards the cars of the New York and New Haven Railroad Company which have been so run on the tracks of the New York and Harlem Railroad Company.

JOSEPH H. TUCK

vs.

WILLIAM BRAMHILL. IN EQUITY.

In the letters patent, granted June 26th, 1855, to Joseph Tuck, for "improvements in packing for stuffing boxes, &c.," the claim, in these words: "The forming of packing for pistons or stuffing boxes of steam engines, and for like purposes, out of saturated canvas, so cut as that the thread or warp shall run in a diagonal direction from the line or centre of the roll of packing, and rolled into form, either in connection with the india-rubber core, or other elastic material, or without, as herein set forth," is a claim for a new article of manufacture, and not for any special use thereof.

The claim to the forming of the roll, "either in connection with the india-rubber core, or other elastic material, or without," is equivalent to two separate claims, one for the forming of the roll with the core, and one for the forming of it without the core.

The roll without the core being old, but the roll with the core being new, the patentee had a right, under the 7th section of the Act of March 3d, 1837, (5 *U. S. Stat. at Large*, 193,) to enter a disclaimer, disclaiming the forming of the roll without the core, and limiting his claim to the forming of the roll with the core.

Although such disclaimer is entered after the commencement of a suit on the patent by the patentee, he can, nevertheless, under the 7th and 9th sections of the said Act of 1837, recover in such suit, unless he unreasonably neglected or delayed to enter such disclaimer, but he cannot recover costs therein.

(Before BLATCHFORD, J., Southern District of New York, April 14th, 1868.)

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THIS was a final hearing, on pleadings and proofs, of a suit in equity, founded on letters patent of the United States, granted to the plaintiff, June 26th, 1855, for "improvements in packing for stuffing boxes, &c."

George Gifford, for the plaintiff.

Charles M. Keller, for the defendant.

BLATCHFORD, J. The patentee says, in his specification: "My invention relates to an improved manner or mode of making or forming packing for pistons, valves, and other parts of steam engines, and for like purposes, from india-rubber and canvas saturated with india-rubber, or other suitable material or composition." He describes, as follows, the mode of carrying out his invention in practice: "I first take canvas, or other suitable material, and saturate it with a solution of india-rubber, or other equivalent composition. I then cut the canvas, thus prepared, in a diagonal manner, into strips of any required width, cement the diagonal ends together, so as to form any length of fillet required, then roll it up into a roll, and allow it to cement in a firm but elastic or flexible roll, of any suitable diameter required. In cases where greater elasticity is required, I roll the canvas round a core or centre-piece of india-rubber, or other suitable elastic material." Annexed to the patent are six figures of drawings, which are described in the specification. Figure 1 represents a section of the packing, which is rolled up from its own centre, and may be round, or nearly so. Figure 2 represents a section of the packing, which is rolled loosely at one point, and tightly at the opposite point, whereby a conical form may be given to the packing, so as to be used in conical seats. Figure 3 represents a section of the packing, rolled around an elastic core of rubber, which core may be square, round, oblong, oval, or of any desired form which the roll of packing is designed to possess. Figure 4 represents a section of the

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packing, having a hollow cylindrical core. Figure 5 represents a section of the packing made according to the combined forms shown in Figures 1 and 4, the canvas being first rolled from its own centre, and then rolled around the core, so as to embrace both its own coils and the core in its outer folds. The specification then says: "In all these figures, but a modification of one general plan is illustrated, namely, the rolling of canvas, first saturated as described, into a fillet, in any reasonable lengths, and of any diameter, from which packing may be cut in lengths, as required. A packing, such as herein described, has heretofore not been known as an article of commerce or of manufacture, and, as such, I claim to be the first inventor or producer of it." Figure 6 represents a vertical section through a packing-box, showing the manner of applying the packing to the cylinder of a steam engine. The specification adds: "Any of the forms of packing represented in the several figures 1, 2, 3, 4, and 5, may be used, that represented at figure 2 being more particularly adapted to the lower part of the packing-box, on account of the conical form of the block behind it. Piston heads and valves, or other places, may be packed in a similar manner, the packing being cut off in suitable lengths, to suit the thing to be packed. By this mode of manufacture, it will be seen that each fold of the packing in contact with the rubbing or moving surface must be entirely worn away, and cannot be drawn out by the rubbing surface, (as is frequently the case when packing is made in concentric folds of prepared canvas,) being held in its place by the ring above and below it." The claim is as follows: "The forming of packing for pistons or stuffing boxes of steam engines, and for like purposes, out of saturated canvas, so cut as that the thread or warp shall run in a diagonal direction from the line or centre of the roll of packing, and rolled into form, either in connection with the india-rubber core, or other elastic material, or without, as herein set forth."

The principal defence set up in the answer, is want of novelty in the invention. The answer avers, that, before the alleged

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invention by the plaintiff, strips of canvas and other cloth, saturated or coated with india-rubber, were rolled up into rolls, both upon and without an inner core of india-rubber, and with the threads of the cloth placed in a direction diagonal to the axis of the roll, and in various other directions, constituting a new manufacture for various uses, and that the application of such manufacture to any special purpose, such as the packing of stuffing boxes, is not an invention, and does not constitute the subject-matter of letters patent. The answer also avers, that the defendant has never made, used, or sold, what is claimed as the invention of the plaintiff, in the patent.

The evidence as to infringement shows the sale by the defendant of two different rolls of packing, which are produced, one of larger diameter than the other, and each having an elastic solid india-rubber core, the section of which core is a square, the rolls of packing being cylindrical. It is also shown, that the defendant, on inquiry being made for "Tuck's patent packing," sold packing similar to the two rolls referred to. The two rolls were purchased by a person who sells the packing as an agent or licensee of the plaintiff, and for the purpose of their being used as evidence of their sale by the defendant. The two rolls are made exactly in accordance with the packing described in the patent.

The defendant showed, by satisfactory proof, that an article, made in the same manner as the plaintiff's packing, but without a core, was known and used several years before the invention of the plaintiff was made. No evidence was given of any prior knowledge of any such article made with a core.

After the testimony on both sides had been put in before the examiner, the plaintiff, on the 18th of February, 1867, filed in the patent office a disclaimer, setting forth that he was still the sole owner of the patent, and entering his disclaimer "to that part of the claim which covers the packing therein described without a core, thereby causing the claim to include only the packing formed out of saturated canvas, so. cut as that the thread or warp shall run in a diagonal direction from

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the line or centre of the roll of packing, and rolled into form in connection with and around an india rubber core, or one of other elastic material, meaning the said claim to include only the combination of an elastic core, with saturated canvas, having threads running in a diagonal direction, as described in said patent, wound around the same."

The plaintiff claims that he is entitled to a decree for a perpetual injunction restraining the defendant from making, using, or selling, the packing which has a core, and for an account in regard to the packing of that kind which he has made and sold.

The claim of the patent is, undoubtedly, as the defendant contends, and as the plaintiff does not deny, for an alleged new article of manufacture, and not for any special use thereof. But the defendant insists, that what is claimed in the patent is not so divisible as to admit of a disclaimer being made to a part of it, and that the alleged invention is not so divisible; in other words, that the plaintiff did not make, and the patent does not make, claim to two separable inventions, but to only one invention, and that that invention is shown not to have been new with the patentee. The ground taken by the defendant is, that the patentee, in his specification, states his invention to be merely the roll formed in the manner described, and that the modification of making it with a core, so as to produce greater elasticity, was not a separate invention in fact, and is not spoken of in the specification as a separate invention, distinct, as such, from the making of the roll without a core. It is true, that the specification speaks of the plan of rolling the canvas, first cut and saturated as described, into a fillet of any reasonable length and of any diameter, as one general plan, and says that the five figures of sections of rolls show what are only modifications of such one general plan. But the claim claims the forming of the roll "either in connection with the india-rubber core, or other elastic material, or without." This is equivalent to two separate claims—one for the forming of the roll with the core, and one for the forming of it without the core. The patentee

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might have made two such claims, separately numbered, and both would have been good claims, if the inventions were new with him. He did that, in effect, in the claim he made. The roll with the core is a distinct thing from the roll without the core. It has a utility of its own, as is quite apparent from the fact that the defendant sells it. The prior existence of the roll without the core is shown, but it is not shown that the roll with the core was known or used before the invention of it by the plaintiff. If the plaintiff had known of the existence of such roll without the core, he could have patented the combination of it with a core, if such combination was invented by him and was new. There is sufficient utility and invention in such combination to support a patent. The result produced by the combination is a new article, and, being useful, it is patentable. (*Crane v. Price, Webst. Pat. Cas.*, 409; *McCormick v. Seymour*, 2 *Blatchf. C. C. R.*, 240, 243.)

It having been shown that the forming of the roll in the manner described, without the core, was old, the next question is, whether the plaintiff could disclaim, as he has attempted to do, the forming of the roll without the core, and limit his claim to the forming of the roll with the core. The 7th section of the Act of March 3d, 1837, (5 *U. S. Stat. at Large*, 193,) provides for the making of a disclaimer, where a claim is too broad, and claims more than that of which the patentee was the original or first inventor; but the disclaimer cannot be made unless some material and substantial part of the thing patented is truly and justly the invention of the patentee, and, in such case, he is authorized to make disclaimer of such parts of the thing patented as he does not claim to hold by virtue of the patent. The defendant contends, that the claim of this patent is not equivalent to two claims, and that, therefore, under the statute, the patentee has no right to disclaim any thing in the claim. But this objection has been already disposed of. The forming of the roll without the core is one material and substantial part of the thing patented. The forming of the roll with the core is another material and substantial part of the thing patented.

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The patentee was not the first inventor of the former. He was the first inventor of the latter. The two are clearly separable and distinguishable. The claim is too broad, and claims more than that of which the patentee was the first inventor. A clear case, therefore, existed, under the 7th section of the Act of March 3d, 1837, for a disclaimer by the patentee of so much of his claim as covers the forming of the roll without the core. The disclaimer goes exactly to that extent. It disclaims that part of the claim "which covers the packing therein described without a core;" and then it goes on to state what the claim will be after such disclaimer, namely, that it will "include only the packing formed out of saturated canvas, so cut as that the thread or warp will run in a diagonal direction from the line or centre of the roll or packing, and rolled into form in connection with and around an india-rubber core, or one composed of other elastic material," and that it will "include only the combination of an elastic core with saturated canvas having threads running in a diagonal direction, as described in the said patent, wound around the same." This disclaimer is unambiguous, and leaves the claim as if it had originally claimed only such combination. It is substantially just such a disclaimer as the Supreme Court, in *Silsby v. Foote*, (14 *Howard*, 218, 221,) held to be valid. The claim there was, to "the application of the expansive and contracting power of a metallic rod, by different degrees of heat, to open and close a damper, which governs the admission of air into a stove, or other structure, in which it may be used, by which a more perfect control over the heat is obtained than can be by a damper in the flue." It having been shown that the application of the expansive and contracting power of a metallic rod, by different degrees of heat, to regulate the heat of other structures than a stove in which the rod was acted upon directly by the heat of the stove, or the fire which it contained, was not new with the patentee, he entered a disclaimer "to so much of said claim as extends the application of the expansive and contracting power of a metallic rod, by different degrees of heat, to any

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other use or purpose than that of regulating the heat of a stove in which such rod shall be acted upon directly by the heat of the stove, or the fire which it contains." The Supreme Court sustained such disclaimer as a good disclaimer, under the 7th section of the Act of 1837.

But the defendant contends, that the disclaimer in this case, if properly made at all, cannot affect the issues in this suit, because it was not filed till after the commencement of the suit. In other words, the defendant contends that the plaintiff cannot recover in this suit, because the claim, as it stood when the suit was brought, embraced more than that of which the plaintiff was the first inventor. In urging this view, the defendant relies on the general principle of law to that effect, as recognized before the Act of March 3d, 1837, was passed, and on the provision of the 7th section of that Act, that "no such disclaimer shall affect any action pending at the time of its being filed, except so far as may relate to the question of unreasonable neglect or delay in filing the same;" and he insists, that the claim of the patent must be construed, for the purposes of this suit, as if no disclaimer had been filed. But the 7th section of the Act of 1837 must be construed in connection with the 9th section of the same Act. The latter section provides, "that whenever, by mistake, accident, or inadvertence, and without any willful default or intent to defraud or mislead the public, any patentee shall have, in his specification, claimed to be the original and first inventor or discoverer of any material or substantial part of the thing patented, of which he was not the first and original inventor, and shall have no legal and just right to claim the same, in every such case the patent shall be deemed good and valid for so much of the invention or discovery as shall be truly and *bonâ fide* his own, provided it shall be a material and substantial part of the thing patented, and be definitely distinguishable from the other parts so claimed without right, as aforesaid; and every such patentee, his executors, administrators, and assigns, whether of the whole or of a sectional interest therein, shall be entitled to maintain a

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suit, in law or in equity, on such patent, for any infringement of such part of the invention or discovery as shall be *bonâ fide* his own, as aforesaid, notwithstanding the specification may embrace more than he shall have any legal right to claim." Under this provision of the 9th section, taken by itself, the plaintiff is entitled to recover in this case, without having entered any disclaimer. The patentee, by inadvertence and mistake, and without any willful default or intent to defraud or mislead the public, claimed, in his claim, to be the original and first inventor of forming the roll without the core, which was a material and substantial part of the thing patented; but still, under this provision of the 9th section, the patent is valid for the forming of the roll with the core, which was first invented by the plaintiff, and is a material and substantial part of the thing patented, and is definitely distinguishable from the forming of the roll without the core. Therefore, the plaintiff, even without the disclaimer, is authorized, by the 9th section, to maintain this suit, for the infringement of so much of the claim as covers the forming of the roll with the core, although the claim embraces also the forming of the roll without the core. It is provided, indeed, by the 9th section, that "no person bringing any such suit shall be entitled to the benefit of the provisions contained in this section, who shall have unreasonably neglected or delayed to enter at the Patent Office a disclaimer, as aforesaid." It is not pretended, however, that the patentee in this case has been guilty of any such neglect or delay. It is further provided, by the 9th section, that, where the plaintiff recovers under that section, "he shall not be entitled to recover costs against the defendant, unless he shall have entered at the Patent Office, prior to the commencement of the suit, a disclaimer of all that part of the thing patented which was so claimed without right." Therefore, the plaintiff can recover no costs in this case.

But, it is urged that the provision of section 7, that "no such disclaimer shall affect any action pending at the time of its being filed, except so far as may relate to the ques-

tion of unreasonable neglect or delay in filing the same," forbids a recovery by the plaintiff in this suit, notwithstanding the provisions of the 9th section. This is not so. It is true, that Judge Story, in *Reed v. Cutter*, (1 *Story*, 590, 600,) says, that if a disclaimer is filed during the pendency of a suit, the plaintiff will not be entitled to the benefit thereof in that suit; and that the same Judge, in *Wyeth v. Stone*, (*Id.*, 273, 294,) says, that the disclaimer mentioned in the 7th section, must be interpreted to apply solely to suits pending when the disclaimer is filed in the Patent Office, and the disclaimer mentioned in the 9th section to apply solely to suits brought after the disclaimer is so filed, and that the proviso to the 7th section, as to the disclaimer affecting a pending suit, prevents its affecting in any manner whatsoever a suit pending at the time it is filed. But the plaintiff does not need to claim any benefit in this suit from the disclaimer. He recovers in this suit by virtue of the 9th section, it not appearing that he unreasonably neglected or delayed to enter a disclaimer. I cannot concur, however, in Judge Story's view of the provision in the 7th section, as to the disclaimer's affecting a pending suit. I understand that provision to mean, that a suit pending when the disclaimer is filed, is not to be affected by such filing, so as to prevent the plaintiff from recovering in it, unless it appears that the plaintiff unreasonably neglected or delayed to file the disclaimer. The "unreasonable neglect or delay," mentioned in the 7th section, manifestly refers to the unreasonable neglect or delay mentioned in the 9th section, and the disclaimer mentioned in the 9th section is clearly the disclaimer provided for in the 7th section. Moreover, the provision of the 9th section, that the plaintiff, where he is entitled to recover under that section, shall not recover costs, unless he has entered a disclaimer, prior to the commencement of the suit, of what he claimed without right, is a strong implication, that, where he does not enter the disclaimer until after the commencement of the suit, he may still recover in the suit, if otherwise entitled to do so, but without recovering costs.

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And such has been the view heretofore held by Mr. Justice Nelson, in this Court. In *Guyon v. Serrell*, (1 *Blatchf. C. C. R.*, 244,) he allowed a recovery, without costs, in a case where a disclaimer was filed after suit brought; and in *Hall v. Wiles*, (2 *Blatchf. C. C. R.*, 194, 198,) he says: "If the disclaimer was entered in the Patent Office before the suit was instituted, the plaintiff recovers costs in the usual way, independently of any question of disclaimer. But if, in the progress of the trial, it turns out that a disclaimer ought to have been made as to part of what is claimed, the plaintiff may recover, but will not be entitled to costs." Of course it follows, that if a disclaimer is made after suit brought, the plaintiff may still recover, but without costs.

The plaintiff is entitled to a decree for a perpetual injunction, as prayed for in the bill, in respect to the packing formed with a core, and for an account in respect to such packing, and for a reference to a Master to take and state such account. He will not be entitled to recover any costs in the suit.

RUFUS HATCH

vs.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, JOHN F. TRACY AND OTHERS.

THE SAME vs. THE SAME. IN EQUITY.

A corporation created by a State other than the State of New York, does not, by reason of its having an office, and transacting material branches of its business, within the State of New York, or by force of the State statute of New York, of April 10th, 1855, (*Laws of 1855, chap. 279*), lose the privilege, which otherwise belongs to it, as a corporation created by another State, of having all its members regarded as citizens of that State, within the meaning of the Acts of Congress in regard to the removal of causes into the Circuit Courts of the United States.

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A suit brought in a State Court of New York, by a citizen of New York, against a corporation created by a State other than New York, and against a citizen of a State other than New York, and against other defendants who are citizens of New York, cannot be removed into a Circuit Court of the United States in New York, under the 12th section of the Judiciary Act of September 24th, 1789, (1 *U. S. Stat. at Large*, 79,) unless the defendants who are citizens of New York are merely nominal parties to the suit.

Where the officers of a corporation are made co-defendants with the corporation to a suit in equity, but no relief is prayed for as to any of such officers that is not prayed for in respect to the corporation, and no relief is prayed for against any such officer in his individual capacity, such officers are merely nominal parties to the suit.

An injunction against a corporation, if served on an officer thereof, or even if known by him to exist, binds him to obedience.

A plaintiff cannot, by joining, as nominal defendants, with a corporation, persons who are citizens of the same State with the plaintiff, deprive the corporation of any right which it would otherwise have in respect to removing a cause into a Court of the United States.

When the proper steps to effect the removal of a cause under the said Act of 1789 have been taken, and evidence thereof is presented to the State Court, the right to have the removal made is perfected, and no action of the State Court can either confer the right or take it away.

The discretion to be exercised by the State Court in passing on the question as to whether such proper steps have been taken, is a legal discretion.

No order by the State Court for the removal of the cause is necessary.

If the defendant does all that is necessary to secure a removal, he can, whether the State Court makes an order of removal or not, perfect the removal, by entering in the Federal Court, at the proper time, copies of the proper papers, and his appearance, and special bail, if necessary; and, when that is done, the cause will proceed in the Federal Court.

When a case is removed under the said Act of 1789, any injunction issued before its removal, *ipso facto* falls.

(Before BLATCHFORD, J., Southern District of New York, April 20th, 1868.)

THESE suits were originally commenced in the Supreme Court of the State of New York. The parties plaintiff and defendant to both suits were the same, except that Edward W. Dunham was a party to the second suit, and was not a party to the first suit. The suits now came before the Court on a motion by the plaintiff to remand them to the State Court, and on a motion by the defendants to dissolve injunctions granted in them by the State Court.

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John K. Porter and John E. Burrill, for the plaintiff.

Charles O'Conor and Charles Tracy, for the defendants.

BLATCHFORD, J. These suits are now in this Court, either as respects all of the defendants in each, or as respects the defendants the railroad company and Tracy, or one of them, in each, by virtue of certain proceedings for the removal of the same from the State Court into this Court, taken in the State Court on behalf of the railroad company and Tracy. Those proceedings were taken under three several Acts of Congress—the 12th section of the Judiciary Act of September 24th, 1789, (1 *U. S. Stat. at Large*, 79,) the Act of July 27th, 1866, (14 *Id.*, 306,) and the Act of March 2d, 1867, (*Id.*, 558.) The State Court made an order, in each suit, on the 15th of February, 1868, which recites, that the defendants the railroad company and Tracy, have presented their petition and affidavits, that the petition, among other things, prays for a removal of the cause into the Circuit Court of the United States for the Southern District of New York, in pursuance of the several Acts of Congress in such case made and provided, that the company and Tracy have entered their appearance in pursuance of said petition and said Acts of Congress, and that the said petitioners have given good and sufficient surety, as required in said Acts of Congress, by a bond, approved in said Court and filed with the clerk thereof, and then orders that the surety so offered is accepted by said Court, and that said Court will proceed no further in the cause against the company and Tracy, or either of them, and that no further proceedings be had in said Court against the company and Tracy, or either of them, and that the cause, as against the company and Tracy, is removed from said Court to the Circuit Court of the United States for the Southern District of New York, in pursuance of the provisions of the said Act of July 27th, 1866. The order states, that it “is granted under and pursuant to the last-mentioned Act of Congress, and is

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without prejudice, as therein provided, to the rights of the parties." Copies of certain process, pleadings, depositions, testimony, and other proceedings in the suits in the State Court, have been filed in this Court, which are asserted, and not denied, to be copies of all the process, pleadings, depositions, testimony, and other proceedings in said suits, which existed therein when the orders for the removal were made by that Court. The company and Tracy have entered, each of them, a general appearance in this Court, in each suit. No one of the other defendants has entered any appearance in this Court in either suit. The plaintiff, insisting that if the suits are in this Court at all, they are here only as respects the company and Tracy, now moves to remand the suits to the State Court, on the ground that a cause does not exist for the removal of either of the suits, in any respect, under any one of the three Acts of Congress referred to.

The complaint in each suit states, that it is brought on behalf of the plaintiff and of all other stockholders of the Chicago, Rock Island and Pacific Railroad Company who may elect to avail themselves of it and contribute to the expenses of the action. The plaintiff alleges, in the complaint in the first suit, that he is a stockholder in the company, and that the company is a corporation, and is organized by virtue of the laws of the States of Illinois and Iowa; that all the directors of the corporation except three reside in the State of New York; and that the individual defendants in said suit are, and have been since April, 1867, such directors. The gravamen of that complaint is, that the defendants are about, without right or authority, and without the sanction of the stockholders of the company, to make a contract, on the part of the company, to extend its railroad from Des Moines, Iowa, to the western boundary of Iowa, and to create a liability on the part of the company in respect thereto, and to use the moneys of the company for such purpose; that they have recently issued, in the name of the company, and sold in the market, at less than par, forty-nine thousand new shares of the capital stock of the company, in addition to ninety-one thousand shares previously issued,

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all the shares being of the par value of one hundred dollars each; that the proceeds of such new shares, which amount to more than four millions of dollars, are in the possession and control of the directors; and that the pretence on the part of the directors, in issuing the new shares, was, that such issue was necessary to enable the company to procure funds to construct such extension of its road, and was made for that purpose. The prayer of the complaint in the first suit is, for a judgment, that the defendants be enjoined and restrained from making any such contract, and from creating any such liability, and from using any of the moneys of the company for such purpose, or in execution of any contract to build such extended road, and from further increasing the capital stock of the company, and from using the proceeds of any of the new forty-nine thousand shares, except to redeem and extinguish such shares, until the stockholders of the company shall, at their next annual meeting, in June, 1868, or at any special meeting to be called for that purpose, have passed upon the action of the directors in issuing the new shares, and upon the disposition to be made thereof, or of the proceeds thereof, and in regard to the proposed extension of the railroad. The complaint also prays, that the defendants may, during the pendency of the action, be enjoined and restrained as above provided, and that a receiver of the proceeds of the forty-nine thousand new shares may be appointed. On this complaint, and on affidavits accompanying it, an *ex parte* injunction was issued by the State Court, on the 6th of January, 1868, enjoining and restraining the defendants, until the further order of the Court, as above prayed for.

The complaint in the second suit reasserts the allegations of the complaint in the first suit, and brings in, as an additional defendant, Dunham, who is the treasurer of the company, but not one of the directors. The principal allegations in the second complaint are, that a committee of the directors, consisting of five of them, and called an executive committee, have, by a majority vote, determined to close the transfer office of the company in the city of New York, and to remove

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all its books and valuable papers beyond the jurisdiction of the Court; that the defendants have refused to allow said books to be examined or inspected by the stockholders; that they are about to remove all the money, securities, and property of the company beyond the jurisdiction of the Court; and that they refuse to permit any transfer to be made, on the books of the company, of any of the shares of stock in the company. The prayer of this complaint is, for a judgment as asked for in the first complaint, and further, that the defendants be enjoined and restrained from removing any of the books of the company, or of the directors, or of the executive committee, beyond the jurisdiction of the Court, and from preventing the plaintiff, or other stockholders, from obtaining an examination and inspection thereof, and from interfering with them in making such examination and inspection, and from removing the proceeds of the forty-nine thousand new shares of stock, or any other property or proceeds thereof, beyond the jurisdiction of the Court, and from permitting to be made any transfer of any shares of the stock of the company, whether of the original ninety-one thousand shares, or of the forty-nine thousand additional shares, until a transfer of all the shares, whether original or additional shares, shall be permitted to be made without distinction, and from closing the office or place of business of the corporation in the city of New York, and that the defendants may be restrained during the pendency of the action. On the complaints in the two suits, and on affidavits on the part of the plaintiff, an *ex parte* injunction was issued by the State Court, on the 7th of January, 1868, enjoining and restraining the defendants, until the further order of the Court, as so prayed for in the complaint in the second suit. It is provided, by the Act of July 27th, 1866, that any injunction granted by the State Court before the removal of the cause, against the defendant applying for its removal, shall continue in force until modified or dissolved by the United States Court into which the cause shall be removed. A motion is now made to this Court, on the part of the

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company and Tracy, to dissolve and set aside the said injunctions.

The motion to remand the causes to the State Court will be first considered. It is not disputed that the plaintiff is a citizen of the State of New York ; nor that the company is a corporation created either by the State of Iowa, or the State of Illinois, or both ; nor that all the other parties defendant, except Tracy, are citizens of the State of New York. On the question of fact, on the evidence, as to the citizenship of Tracy, I concur with the view of Judge Cardozo, in the State Court, that, for the purposes of a removal of the suits into this Court, Tracy is a citizen of the State of Illinois. The petition to the State Court, by the company and Tracy, was in proper form, they duly entered their appearance in the State Court, and they gave good and sufficient surety, by a proper bond, as required by the Acts of Congress, and the State Court accepted the surety so offered. Copies of all the proceedings in the State Court have been duly filed in this Court, and the appearance of the company and Tracy has been entered in this Court. So far as formalities are concerned, therefore, every thing required by the Acts of 1789 and 1866, to be done by the company and Tracy, to obtain and perfect the removal of the causes into this Court, has been done by them.

The objection is taken by the plaintiff, that the company, although a corporation created by a State other than the State of New York, has, by reason of its having an office, and transacting material branches of its business, within the State of New York, and by force of an Act of the Legislature of that State, passed April 10th, 1855, (*Laws of 1855, chap. 279,*) lost the privilege, which otherwise would have belonged to it, as a corporation created by another State, of having all its members regarded as citizens of that State, within the meaning of the Acts of Congress in regard to the removal of causes into this Court. That Act is one providing for the mode of serving on a foreign corporation process in a suit. It is settled, by the decisions of the Supreme Court, that a cor-

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poration can have no legal existence out of the bounds of the sovereignty by which it is created, that it exists only in contemplation of law, and by force of that law, that where that law ceases to operate the corporation can have no existence, and that it must dwell in the place of its creation. (*Bank of Augusta v. Earle*, 13 *Peters*, 512; *Ohio and Mississippi R. R. Co. v. Wheeler*, 1 *Black*, 286.) It is also settled, by like decisions, that a suit against a corporation, in its corporate name, must be regarded as a suit against citizens of the State which created it, the legal presumption being, that its members are citizens of that State, the only State in which the corporate body has a legal existence; and the legal presumption, therefore, being, that a suit against the corporation, in its corporate name, is a suit against citizens of the State which created it, and no averment or evidence to the contrary being admissible, to withdraw the suit from any jurisdiction which a Court of the United States would otherwise have over it. (*The Louisville, Cincinnati and Charleston R. R. Co. v. Letson*, 2 *Howard*, 497; *Marshall v. The Baltimore and Ohio R. R. Co.*, 16 *Howard*, 314; *The Covington Drawbridge Co. v. Shepherd*, 20 *Howard*, 232; *Ohio and Mississippi R. R. Co. v. Wheeler*, 1 *Black*, 286.) It follows, therefore, that, for the purposes of jurisdiction by the Courts of the United States, these suits, so far as they are suits against the company, are suits against citizens of the State which created the company. Such State was not the State of New York. Nothing done by the company in regard to the place or manner of transacting its business, and no statute of the State of New York in regard to it, can deprive it of the rights and privileges which thus belong to it, as a corporate body created by another State than New York. It is still a foreign corporation, so far as its entity and legal existence is concerned. In *Pomeroy v. The New York and New Haven R. R. Co.*, decided in this Court, in December, 1857, (4 *Blatchf. C. C. R.*, 120,) it was held, that a foreign corporation, sued, by its own assent, by summons served on an agent in New York, was still a foreign corporation, resident in the State which

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created it; that it could not exist in New York in its corporate capacity, except as a New York corporation; that, as a foreign corporation, it could not be said to have any legal existence in New York; that its existence in the foreign State might be recognized in New York, and the exercise of many rights and privileges in New York might be permitted to it, either by express statute, or by comity; but that its corporate existence in New York could be created only by New York laws, and by making it a New York corporation.

These suits, therefore, are suits brought in the State of New York, by Hatch, a citizen of New York, against the members of the company, all of whom are citizens of the State which created the company, and which is a State other than New York, and against Tracy, a citizen of Illinois, and against other defendants, who are citizens of New York.

The first question is, whether the case is removable under the Act of 1789. Under the twelfth section of that Act, the suit, to be removable, must be commenced against an alien, or by a citizen of the State in which the suit is brought against a citizen of another State. By the eleventh section of the same Act, original jurisdiction is given to the Circuit Courts, of civil suits where "an alien is a party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State." The language of the two sections is substantially identical in regard to the citizenship. Under the 11th section, it was held, in *Strawbridge v. Curtis*, (3 *Cranch*, 267,) that each distinct interest must be represented by persons, all of whom are entitled to sue or may be sued in the Federal Courts; that is, that, where the interest is joint, each of the persons concerned in that interest must be competent to sue, or liable to be sued, in those Courts. Under the 12th section, it was held by this Court, in *Ward v. Arredondo*, (1 *Paine's C. C. R.*, 410,) that a suit by a citizen of New York, against a defendant who was an alien, and a defendant who was a citizen of New York, could

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not be removed into this Court by the alien, where the defendant who was a citizen of New York, was not a mere nominal party to the suit, but was a real and an indispensable party to the decision and final determination of the merits of the case. These decisions have always been followed by the Courts of the United States, and it results from them, that these suits cannot be removed into this Court, under the Act of 1789, unless the defendants, other than the company and Tracy, are merely nominal parties to the suit.

The entire scope and object of the first suit, as shown by the complaint therein, is to restrain the company from extending its road beyond Des Moines, and from using any of its moneys or property for that purpose, and from issuing any new shares of stock, and from using any of the proceeds of the forty-nine thousand new shares, except to redeem and extinguish those shares; until the stockholders of the company shall, at a meeting, have passed upon the whole subject, and to have a receiver appointed of the proceeds of the forty-nine thousand new shares. The entire scope and object of the second suit, as shown by the complaint therein, is the same as in the first suit, and, in addition, to enjoin and restrain the company from removing its books or property beyond the jurisdiction of the Court, and from interfering with the stockholders in examining the books, and from permitting any transfer of any shares to be made unless a transfer of all, without distinction, old and new, is permitted, and from closing its office or place of business in New York. All the relief that is prayed for in either suit is by injunction, except the prayer in the first suit for a receiver. All the relief by injunction is prayed for in respect to all of the defendants. No such relief is prayed for in respect to any defendant, other than the company, that is not prayed for in respect to the company. The suits are really, both of them, wholly against the company alone. The directors and the treasurer, who are its co-defendants, are merely its servants and agents, through whom necessarily it acts. It was not necessary or proper to make them parties to the suit at all. The injunc-

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tions prayed for and the injunctions issued, if issued against the company alone, and served on any director, or on the treasurer, would bind the person so served to obedience, and, even without such service, knowledge by the officer of the existence of the injunction against the company, would bind the officer to obedience. (*The People v. Sturtevant*, 5 *Selden*, 263, 277.) The directors and the treasurer are, therefore, not real parties to the suits, but merely nominal parties. No personal demand is made against any one of them, nor is any personal accounting asked from any one of them, and it is only in his relation to the company, and in the official position that he occupies toward the company, that any one of them is made a party. The test of this is, that, if any one of the directors or the treasurer were to resign his office, he would necessarily cease, *ipso facto*, to be a proper party to the suit, and the plaintiff would be obliged to make his successor in office a party, and so on with every change. The reason for this would be, that, there being no relief prayed against the individual in his individual capacity, and the injunction asked being to restrain him merely from doing or not doing what his official relation to the company alone enables him to do, or to refrain from doing, when such official relation ceases, the relief asked and the injunction issued become, as to him, utterly futile. This would not be the case where he was made a party defendant, jointly with the corporation of which he was an officer, for the purpose of obtaining some specific relief against him on a personal liability, or in order to obtain a discovery from him in regard to matters peculiarly within his knowledge. There, the dissolution of his official relation would not affect the propriety of his being retained as a defendant. This view is conclusive to show that the entire real controversy in both suits, so far as it is shown by the prayer of the complaints, and which is the only guide the Court can have, is between the plaintiff on the one side, and the company, as a corporate body, on the other. The plaintiff cannot, by joining as nominal defendants with the corporation, persons who are citizens of the same State with the plaintiff,

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deprive the corporation of any right which it would otherwise have in respect to removing the cause into this Court. In *Wormley v. Wormley*, (8 *Wheaton*, 421, 451,) it was held, that the joining, as defendant in an equity suit in the Circuit Court, of a person who was a citizen of the same State with the plaintiffs, constituted no objection to the jurisdiction of the Court over the suit, where such person was merely a nominal defendant, joined for the sake of conformity in the bill, and against whom no decree was sought; and the principle was laid down, that the Court would not suffer its jurisdiction to be ousted by the mere joinder of formal parties, but would decide on the merits of the case between the parties who had the real interests before it, whenever that could be done without prejudice to the rights of others. This doctrine is as applicable to a jurisdiction conferred by a removal, as it is to one conferred by the bringing of an original suit. So, also, in *Carneal v. Banks*, (10 *Wheaton*, 181, 188,) where parties were made defendants to a suit in equity, who were citizens of the same State with the plaintiff, the Court held that they were improperly made defendants, and that that fact could not affect the jurisdiction of the Court as between the parties who were properly before it, and that the bill might be dismissed as to the improper parties, without in any manner affecting the suit against the proper parties.

The matter in dispute in the suit exceeds the "sum or value of five hundred dollars, exclusive of costs," within the meaning of that language, as used in the 12th section of the Act of 1789. The matter in dispute is a right claimed by the plaintiff, and denied by him to the corporation, and is a right concerning property, and a right having a known and certain value in money, which can be calculated and ascertained in the ordinary mode of a business transaction, and which is shown to be of the value, in money, of more than the sum of five hundred dollars, exclusive of costs. (*Barry v. Mercein*, 5 *Howard*, 103, 120.)

There is no satisfactory evidence that the company or Tracy, or any of the defendants in the suits, entered an ap-

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pearance in the suits in the State Court, or did any thing which was equivalent to the entry of such an appearance, prior to the entry of appearance made by the company and Tracy at the time they presented their petition to the State Court for the removal of the suits. The sureties offered to the State Court were good and sufficient, and were so held to be by the State Court by its acceptance thereof, as shown by the orders of that Court to that effect. The sureties consisted of a bond in each suit to the plaintiff in the penalty of \$5,000, reciting the filing of a petition and affidavits, by the company and Tracy, in the State Court, for the removal of the suits into this Court, and conditioned that the company and Tracy should, on the first day of the next session of this Court, enter in this Court copies of the process against the company and Tracy in the suit, and of all pleadings, depositions, testimony, and other proceedings in the cause affecting or concerning them, and of all other proceedings in the suit, and should also appear and enter their appearance in this Court.

Every thing, therefore, was done by the company and Tracy, that was requisite to effect a removal of the causes under the Act of 1789. When the proper steps had been so taken, and evidence of their having been so taken was presented to the State Court, it was the duty of the State Court to accept the sureties, and proceed no further in the causes. The right of the company and Tracy to have the removal made was perfected by the taking of those steps and the presentation of that evidence, and no action of the State Court thereon could either confer the right or take it away. The discretion to be exercised by the State Court in passing on the question as to whether the proper steps for a removal have been taken, and as to whether the evidence thereof is sufficient, and as to whether the surety is good and sufficient, is a legal discretion. (*Gordon v. Longest*, 16 *Peters*, 97, 104.) No order of the State Court for the removal of the cause is necessary. The right of the defendant to a removal is not dependent on the question whether the State Court does or does not make an order for the removal. If it were so dependent, the

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refusal of the State Court, in a proper case, to make such an order, would make it impossible for the defendant to secure the removal, except by carrying the suit through the State tribunals, and then carrying it from the highest State tribunal to the Supreme Court of the United States, under the 25th section of the Judiciary Act of 1789. A defendant is not, however, where a State Court is improperly proceeding in a cause, in violation of the 12th section of the Act of 1789, restricted to such mode of relief. Where the right to remove a cause is complete, the power of the State Court, in respect to the cause, is at an end, and the defendant is not obliged to follow the cause further in any State Court, either of original or appellate jurisdiction. (*Kanouse v. Martin*, 15 *Howard*, 198.) If he does all that is necessary to secure a removal, then, whether the State Court makes an order of removal or not, he can perfect the removal, by entering in this Court, at the proper time, copies of the proper papers, and his appearance, and special bail, if necessary. When that is done, the cause will proceed in this Court. These observations are made for the purpose of showing that these causes are removed into this Court under the Act of 1789, and are removed wholly and not partially, and are removed as between all the parties thereto, the only parties thereto being those who are the real parties, namely, the plaintiff and the company, and that they are so removed, although the order of the State Court in each case states that the cause is removed as against the company and Tracy, in pursuance of the Act of 1866, and that such order is granted under and pursuant to the last-named Act.

These cases having been thus removed into this Court under the Act of 1789, and being properly in this Court under that Act, it becomes unnecessary to consider any of the questions discussed by counsel as to removals of the cases under the Acts of 1866 and 1867. The motion to remand the cases is denied.

Where a case is removed under the Act of 1789, any injunction issued before its removal, *ipso facto* falls, for the reason that the 12th section of the Act, while it is careful

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to preserve the lien of an attachment issued before the removal, in certain cases, does not preserve an injunction, and, where Congress has intended to preserve the lien of an attachment, and also continue in force an injunction, it has so expressly declared, as in the Acts of 1866 and 1867. (*M^cLeod v. Duncan*, 5 *McLean*, 342.) The motion to dissolve the injunctions, was, therefore, unnecessary, as the injunctions are no longer in force. The motion is, therefore, denied.

CHARLES R. COLEMAN

vs.

D. RANDOLPH MARTIN AND OTHERS. IN EQUITY.

A person who has no interest, in a legal sense, in the subject-matter of a suit *in personam*, and who is not a party to it, cannot compel the plaintiff to make him a party.

* (Before BLATCHFORD, J., Southern District of New York, April 20th, 1868.)

THIS was an application made to the Court, by petition, by Charles H. Stewart, who was not a party to the suit, praying that he might be made a party defendant. The ground of his application was, that, by reason of certain matters, which he set forth, he might be held, both legally and morally, responsible, pecuniarily and personally, for certain transactions of which the plaintiff complained in his bill; and that the decree of this Court in the suit would have "a powerful influence" in contributing to that result.

Luther R. Marsh, for the petitioner.

E. Louis Lowe, for the plaintiff.

BLATCHFORD, J. The decree of this Court in this suit can in no manner bind or affect the petitioner, in a legal

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sense; and it was never known that a person, not a party to a suit *in personam*, could compel a plaintiff to make him a party. The present defendants do not raise the objection that the petitioner should be made a party. This being so, the plaintiff is left free to sue whom he pleases, subject only to the power of the Court at any time to compel him to join, as a party defendant, any person whom it is necessary to make a party, in order to make a decree fully effective against those who are already parties. It does not appear that the defendant is such a necessary party. He has no interest, in a legal sense, in the subject-matter of this suit, which is only a suit to compel the defendant Martin to surrender, to be cancelled, certain certificates of stock and bonds, and to compel the defendants Martin and Fant, as trustees, to release and cancel a certain deed of trust, and to compel Martin to account with the plaintiff for certain stock, bonds, and moneys, and to enjoin Martin from transferring, or disposing of, certain stock and bonds. In these matters, which are personal claims against Martin and Fant, the petitioner has no interest. In a suit *in rem*, where a Court has jurisdiction over the *res*, and its decree affects the interest in the *res* of all persons who have any interest in the *res*, a person who has a lien or claim upon, or other interest in, the *res*, is allowed to intervene, and be heard for his own interest in the *res*. The theory of this is, that the person, by his interest in the *res*, has an interest, in a legal sense, in the subject-matter of the controversy. But in a suit *in personam*, a person not a party to the suit can have no interest, in a legal sense, in a personal claim made, in the suit, against a defendant therein, unless it is necessary that such person, not a party, should be made a party, in order to properly enforce such claim.

The prayer of the petition is denied.

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HENRY B. GOODYEAR, AS ADMINISTRATOR, &C., OF NELSON
GOODYEAR, DECEASED, AND OTHERS.

vs.

GEORGE EVANS. IN EQUITY.

The reissued Letters Patent, Nos. 556 and 557, granted to Henry B. Goodyear, administrator of Nelson Goodyear, May 18th, 1858, for an "improvement in the manufacture of india-rubber," on the surrender of the original patent, granted to Nelson Goodyear, May 6th, 1851, are valid.

It is an infringement of those reissued patents to use, for dental purposes, india-rubber prepared in accordance with Letters Patent granted to Edwin L. Simpson, October 16th, 1866, for an "improvement in dental rubber," and to vulcanize it, and then to use the product.

The Simpson patent is not an adverse patent to the Goodyear reissues, or one for the same invention covered by the Goodyear reissues, and does not confer upon the holder of it any *prima facie* right to use, without license, any thing covered by the Goodyear reissues, or warrant the withholding of an injunction to restrain a party working under the Simpson patent from infringing the Goodyear reissues.

(Before BLATCHFORD, J., Southern District of New York, April 23d, 1868.)

THIS was a motion for a provisional injunction, founded on letters patent granted to Nelson Goodyear, May 6th, 1851, for an "improvement in the manufacture of india-rubber," and reissued in two reissues, Nos. 556 and 557, to Henry B. Goodyear, administrator of Nelson Goodyear, May 18th, 1858, and duly extended, May 5th, 1865, for seven years from May 6th, 1865.

Charles M. Keller and *Charles F. Blake*, for the plaintiffs.

Stephen D. Law, for the defendants.

BLATCHFORD, J. The reissued patents in this case cover the invention of what is known as hard india-rubber. Re-

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issue No. 556 is for the process, and Reissue No. 557 is for the product. No. 556 claims "the combining of sulphur and india-rubber, or other vulcanizable gum, in proportions substantially as specified, when the same is subjected to a high degree of heat, substantially as specified according to the vulcanizing process of Charles Goodyear, for the purpose of producing a substance or manufacture possessing the properties or qualities substantially such as described, and this I claim, whether the said compound of sulphur and gum be, or be not, mixed with other ingredients, as set forth." No. 557 claims "the new manufacture or substance herein above described, and possessing the substantial properties herein described, and composed of india-rubber, or other vulcanizable gum, and sulphur, in the proportions substantially such as described, and, when incorporated, subjected to a high degree of heat, as set forth, and this I claim, whether other ingredients be, or be not, used in the preparation of the said manufacture, as herein described." The Goodyear Dental Vulcanite Company, who are joined as plaintiffs in this suit, are the owners of the exclusive right under the reissued patents, for the extended term, to the inventions covered thereby, as applied to dentistry, and for dental uses, within and throughout the United States. The bill alleges an infringement of the reissued patents by the defendant, by the manufacture, use, and sale of hard rubber for dental purposes, and by the making and using of hard rubber for plates for artificial teeth, and by the sale of such plates, such hard rubber being made substantially according to the process described in the reissued patents. It is shown, that the defendant has made dental plates for artificial teeth, and artificial gums and palates, of india-rubber, manufactured in accordance with letters patent of the United States, granted to Edwin L. Simpson, October 16th, 1866, for an "improvement in dental rubber," the india-rubber being manufactured by A. R. Hale, and the plates being vulcanized by the defendant, in the manner described in the Nelson Goodyear patent, with only the difference, that the time required for vulcanization is longer under the Simpson patent.

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It is claimed, on the part of the defendant, that, in using, for dental purposes, india-rubber prepared according to the Simpson patent, and vulcanizing it, and then using the product, he does not employ either the process or the product covered by the Goodyear reissues. These reissued patents have been fully sustained by this Court, after a thorough investigation into the novelty of the invention and the validity of the patents. The main decision in favor of the patents, on all the questions involved, was in October, 1862, in the case of *Goodyear v. The New York Gutta Percha Co.*, (2 *Fisher's Patent Cases*, 312,) on a final hearing in equity. Subsequently, in the case of *Goodyear v. Wait*, (5 *Blatchf. C. C. R.*, 468,) a suit brought for an infringement of the patents by the manufacture of plates of hard vulcanized rubber for artificial teeth, and by the sale of plates so made, this Court upheld the patents against all the defences set up. Among those defences were, that the reissued patents were void, because, on the reissue, there was a division into two reissued patents, one for the process and the other for the product; that the descriptions in the specifications were not sufficiently full and clear; and that the invention, so far as respects the application of the product to dental purposes, had been dedicated to the public. On this last point, Mr. Justice Nelson, in the opinion delivered by him in the case, held, that the proofs in the case showed that great and extraordinary exertions had been made, by the proprietors of the dental branch of the patent, to get the article into common use, and to prevent piracies, and that there had been no dedication or abandonment of their right.

For the purposes of this motion, therefore, all questions must be regarded as settled, except the question, whether it is an infringement of the Nelson Goodyear patents to use hard rubber prepared according to the Simpson patent. The Goodyear reissues, in their claims, claim, that the india-rubber and the sulphur must be combined substantially in the proportions described in the specifications. What are those proportions? The specifications state them to be about from

four ounces to a pound of sulphur to a pound of india-rubber. They also state, that, in working the vulcanizing process of Charles Goodyear (that is, to make what is called soft rubber,) the best results are obtained by the use of the smallest proportional quantity of sulphur which will suffice to produce the change termed vulcanization, and which is usually not over one ounce of sulphur to a pound of gum, but that so small a proportional quantity of sulphur would entirely fail to produce the result obtained by the Nelson Goodyear process. Again, the specifications say: "The character of the new manufacture or substance is dependent upon the use of caoutchouc, and a sufficiently proportional quantity of sulphur, and a sufficiently high degree of heat, continued long enough to induce the change indicated; and, although much latitude may be taken in the proportional quantity of sulphur, a proportion much less than four ounces to the pound of caoutchouc will utterly fail to produce the new substance or manufacture herein above described." "The change indicated" is the production of a compound having the "hard and tough properties found, in various degrees, in ivory, bone, tortoise shell and horn, and the spring-like property, under flexure, of whalebone, and which, in the process of manufacture, is plastic, so that it can be moulded or modelled with facility into any desired shape, and which, when completed, may be wrought and polished to as high a degree as any of the native substances for which it is a substitute."

The specification of the Simpson patent says: "The rubber now used for dental purposes has incorporated with it large proportions of free sulphur, for the purpose of vulcanizing the rubber after it is formed." It is evident, that, by "rubber" here, is meant the compound of india-rubber and sulphur, before it is vulcanized, and in the condition in which it is when prepared for dental purposes, and ready to be vulcanized. The specification proceeds: "The odor and taste occasioned by the presence of this sulphur, is extremely obnoxious to many persons, and occasions the principal, if not the only, objection to the use of rubber for dental purposes."

To overcome this objection, and produce vulcanized rubber for dental purposes, without the actual or apparent presence of sulphur, is the object of my invention, and consists in preparing the rubber for vulcanizing by the introduction of a peculiar vulcanizing compound." The patentee then describes the mode of making this vulcanizing compound. He says: "I first boil linseed or other vegetable oil to the consistency of honey, (this I do to facilitate the preparation,) thoroughly mix two ounces of benzoin gum with one pound of pulverized sulphur; then, to each quart of the boiled oil add one pound of the prepared sulphur, carefully subjecting this mixture to a moderate heat, sufficient only to cause the two substances to react upon each other, until they pass from a semi-fluid to a semi-hard state, having a honeycomb or spongy appearance." He also says, that the benzoin gum, "by its vaporizing qualities, more perfectly expels the fumes of the sulphur, as well as the odor from the oil, and renders the compound nearly, if not perfectly, odorless, and, when combined with india-rubber, or similar gums, and subjected to a regulated heat, will cause the same to undergo the change known as vulcanizing." To produce the rubber for dental purposes, he adds, to one pound of india-rubber, from ten to fourteen ounces of the vulcanizing compound, twelve ounces being the proper quantity for general purposes, the hardness of the rubber, after curing, increasing with the increase in the quantity of the vulcanizing compound: The compound and the rubber are thoroughly mixed, by being ground between warm rolls, and coloring matter is put in, if desired. The mixture is plastic, and is rolled into thin sheets, and is then ready for the dentist's use. The dentist forms the plate in the ordinary manner for other rubber, and then vulcanizes it by subjecting it to a heat of 320 degrees, Fahrenheit, for about four hours, or for a proportionately less time, with a higher degree of heat. Otherwise, it is treated as ordinary rubber, "and the plate, thus prepared, will be as tasteless and odorless as metal plate, and will not tarnish the fillings, or other gold, in the mouth of the wearer." The claim of the

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patent is this: "Combining the within described vulcanizing compound with india-rubber, in the proportions herein named, and substantially in the manner and for the purposes specified."

This specification does not pretend that the product formed by combining the vulcanizing compound with india-rubber, and subjecting the mixture to heat until it undergoes the change known as vulcanizing, differs, in any of its qualities or properties or capacities, from the product formed according to the Nelson Goodyear patents, except in being tasteless and odorless. It is not pretended that it does not possess all the properties which the specifications of the Nelson Goodyear reissues state are possessed by the product described in those reissues, and all the properties which the product formed by the process described in those reissues in fact possesses. It may possess some other qualities, such as being tasteless and odorless, and thus not obnoxious to those who dislike the odor and taste of sulphur, and not tarnishing gold, but still it possesses all the intrinsic, valuable, and distinctive qualities, as a product, which belong to the Nelson Goodyear product. It may be an improvement, and patentable, and yet it does not follow that it can be made or used without the permission of the owners of the Nelson Goodyear patents. On the face of the Simpson specification, the invention seems to be one merely for getting rid of the odor and taste of the sulphur used. The specification expressly states, that the object of the invention of Simpson is to overcome the objection to the odor and taste occasioned by the presence of free sulphur in the rubber used for dental purposes. The patentee does not pretend that he is not going to prepare hard vulcanized rubber, or that he is not going to vulcanize it by applying heat to a combination of india-rubber and sulphur. On the contrary, he says he is going to produce vulcanized rubber, and that he is going to do it "without the actual or apparent presence of sulphur." He does not venture to say that he can vulcanize the rubber without the actual presence of sulphur, but as the product has no odor or taste of sulphur, and thus there is no apparent presence of sulphur,

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he says that he produces the vulcanized rubber "without the actual *or* apparent presence of sulphur." That sulphur is actually used by him in making what he calls his vulcanizing compound, is fully set forth in his specification, and the quantity of sulphur is given ; and the entire point of the invention, as the specification discloses it, is, that the benzoin gum, by its vaporizing qualities, expels the fumes of the sulphur and the odor of the oil, and renders the compound odorless. The specification then explicitly says, that the vulcanizing is effected by subjecting to heat the mixture formed by combining with india-rubber the compound composed of the oil, the benzoin gum and the sulphur. Therefore, sulphur is used, "pulverized sulphur," as the specification says. It is actually present, although not apparently present, because its fumes are expelled by the use of the benzoin gum. It is there for all the practical purposes of vulcanizing, but it is not there to be smelt or tasted. The invention of Simpson is clearly, therefore, only an improvement on that of Nelson Goodyear, embodying the latter, and not capable of being used without using the latter, provided it involves the use of sulphur in the proportions covered by the Nelson Goodyear reissues.

The plaintiffs produce the depositions of four chemical experts, Thomas Antisell, Chief Chemist of the Agricultural Department of the Patent Office at Washington, and formerly Chief Examiner in said Office, Henri Erni, formerly Chief Chemist in said Department, and now an Examiner in the Patent Office, Dubois D. Parmelee, a chemist in the city of New York, and Eben N. Horsford, Professor of Chemistry in Harvard University. Dr. Antisell has analyzed a piece of the vulcanizing compound, made according to the Simpson patent, and states its ingredients and their proportions. He finds in 100 parts of it 66.25 parts of rubber and foreign matter, 12.25 parts of free sulphur, and 21.50 parts of coloring matter, and says that it contains the ingredients, and in the proportions, described in the Nelson Goodyear reissues, and that, if heated according to the vulcanizing process, hard rubber, such as is described and claimed in such reissues,

must be produced. Erni, Parmelee, and Horsford say, that they have each examined the Simpson specification, with a view of determining the proportion of sulphur to the pound of rubber, contained in the vulcanizing compound described therein. Erni and Horsford say, that, by following the specification, they find that the compound, when vulcanized, does not contain less than four ounces of sulphur to sixteen ounces of rubber. This they demonstrate by a detailed calculation, which they set forth. Parmelee, by following the Simpson specification, calculates that, in the compound ready for vulcanization, there is about $4\frac{1}{2}$ ounces of sulphur to 16 ounces of rubber. Erni and Horsford say, that Dr. Antisell's analysis shows 4.34 ounces of sulphur to 16 ounces of rubber; and they and Parmelee say, each of them, that his deduction is corroborated by Dr. Antisell's analysis, because there is, in fact, as shown by the analysis, a greater loss of linseed oil by heat than is allowed in the calculations. Erni and Horsford allow a loss of one-sixth of the weight of the oil, in heating it. Parmelee allows a loss of a little more than one-third of the weight of the oil. Erni, Parmelee and Horsford, all of them, say, that the compound of Simpson is made in accordance with the invention of Nelson Goodyear. The result of this analysis is what was to be expected. The article, before analysis, has the properties of the Nelson Goodyear hard rubber. It is known to be made by the use of sulphur, rubber, and heat, under a description which shows a use of not less than four ounces of sulphur to a pound of rubber. The analysis shows that it contains not less than four ounces of sulphur to a pound of rubber. Sulphur is known to be the vulcanizing agent, and it is stated, in the Nelson Goodyear specifications, and known to be the fact, that a quantity of sulphur not much less than four ounces to a pound of rubber is required to produce, with the aid of heat, hard vulcanized rubber. Nothing more is needed to establish clearly that the use of the Simpson vulcanized product, is an infringement of reissue No. 557, and that the manufacture of it by the Simpson process, is an infringement of reissue No. 556.

The reissued patents being fully established, and there

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being no doubt on the question of infringement, there would seem to be no doubt of the propriety of granting an injunction. But the defendant claims that the fact of the issuing of the Simpson patent is ground for withholding an injunction. The Simpson patent, however, can be of no avail to any greater extent than it purports to go. It is evidence merely of the novelty of what it claims, that is, the combining with india-rubber a compound, composed of benzoin gum, sulphur, and oil, prepared in the manner stated. That is all. A patent for such combination cannot confer upon the holder of it even a *prima facie* right to make the combination without the license of a person holding a subsisting prior valid patent for the combination of sulphur and india-rubber, without the benzoin gum and the oil, any more than the patent to the latter can confer upon the latter the right to make, without the consent of the former, the combination covered by the patent held by the former. The defendant furnishes no evidence, by analysis of the Simpson rubber, to controvert the analysis testified to by the plaintiffs' experts, and all the affidavits on the part of the defendant as to the quantity of sulphur contained in Simpson's vulcanized product, and as to the question of noninfringement, are altogether vague, general, and unsatisfactory, and the defendant does not satisfactorily meet the deductions and calculations drawn by the plaintiffs' experts from the language of the Simpson specification.

No case has been cited in which an injunction has been refused, where the subsequent patent set up by the defendant contained itself satisfactory evidence on its face, when read by experts, that its process involved an infringement of the prior patent. The Simpson patent, in the sense of the law, and of the decisions as to granting injunctions, is not an adverse patent, or one for the same invention as the plaintiffs', or one conferring upon its holder any *prima facie* legal authority to use, in working it, any thing before patented by the Goodyear reissues.

An injunction must be issued, as prayed for.

Goodyear v. Toby.

HENRY B. GOODYEAR, ADMINISTRATOR, &C.

vs.

WILLIAM B. TOBY. IN EQUITY.

Where, in a suit in equity, a plea to the bill is filed, unaccompanied by any certificate of counsel, or any affidavit of the party, as required by the 31st Equity Rule, and the plaintiff, instead of disregarding the plea, or moving to take it from the files, or setting it down for argument, files a demurrer to it, and the cause is then regularly brought to argument, on the question of the sufficiency of the plea, the want of the certificate and affidavit must be regarded as waived by the plaintiff.

To a bill against a single defendant, alleging the infringement of a patent, by sales by him of the patented article, a plea was filed alleging that the sales were not made by the defendant alone, but were made by him and another person named in the plea: *Held*, that the plea was bad, because it did not allege that such other person was yet living, and within the jurisdiction of the Court.

Whether, in a suit in equity for an account, for the infringement of a patent, all joint wrong-doers are necessary parties defendant, *quere*.

(Before HALL, J., Northern District of New York, May 1st, 1868.)

THIS was a bill in equity, alleging the infringement of letters patent, by repeated sales of the patented article, and prayed for a discovery, for an injunction, and for an account of profits. The defendant filed a plea to the bill, alleging that all such sales, made prior to a day specified, were made by a firm composed of the defendant and one Snow, as partners, and not by the defendant alone, or with his knowledge or consent; and that all sales subsequently made, were made by a firm composed of the defendant and one Worden, and not by the defendant alone, or with his knowledge or consent. The plaintiff filed a demurrer to the plea.

HALL, J. There was not attached to, or filed with, the plea in this case, any certificate of counsel, that it was, in his

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opinion, well founded in point of law, or any affidavit of the party, that it was not interposed for delay, as required by the 31st Equity Rule. That rule provides, that no demurrer or plea shall be allowed to be filed, unless upon such certificate, and when supported by such affidavit; but the plaintiff, instead of disregarding the plea, or moving to take it from the files, and instead of setting the plea down for argument, according to the 33d Equity Rule, and the practice of this Court, filed a demurrer to the plea, substantially in the form of a demurrer to a plea in a suit at law. As there is no joinder in demurrer among the papers submitted, it is possible that the counsel for the respective parties became aware that no demurrer, or joinder in demurrer, was necessary, in order to test the sufficiency of the plea.

It was urged, at the hearing, that the plea should be overruled, or, rather, that the demurrer should be allowed, because no certificate of counsel was filed with the plea, and, also, because the plea was not supported by an affidavit that it was not interposed for delay. But these irregularities cannot be made available on the present hearing. The cause was placed upon the calendar, and was regularly brought to argument, upon the question of the sufficiency of the plea, and this must be considered as equivalent to setting down the plea for a hearing, and as a waiver of any irregularity in the filing of the plea. These objections are, therefore, overruled.

The plea does not allege that Snow, or Worden, is yet living. This would seem to be a fatal objection to the plea, even if it should be conceded that these persons, if living, are necessary parties to the bill. Under the 47th Equity Rule, the want of proper parties is not a fatal defect, if the parties are out of the jurisdiction of the Court; and it is quite clear, that, in order to constitute the fact of a want of parties a good defence, it should be shown by the plea that the persons alleged to be necessary parties, are alive and within the jurisdiction of the Court.

It may well be doubted, whether, in the case of a bill for

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an account for an infringement of a patent, the plaintiff is bound to make all joint wrong-doers parties to his bill; for, if they are liable severally, as well as jointly, in equity, as they clearly are at law, the plaintiff may proceed against any one of them alone, under the 51st Equity Rule. But the objection before stated is fatal to the plea, and it is, accordingly, overruled and disallowed, with costs.

THE UNITED STATES vs. JOHN B. ADDATTE.

The 12th section of the Act of June 30th, 1864, (13 *U. S. Stat. at Large*, 222,) does not cover a case of the possession of false or counterfeit plates, in the similitude of genuine plates of the currency of the United States, but applies only to genuine transferred plates made after the similitude of other plates.

(Before BENEDICT, J., Eastern District of New York, May 2d, 1868.)

THIS was a motion in arrest of judgment. The prisoner was indicted under various statutes relating to counterfeiting the currency of the United States. The evidence given on the trial was such as to make a conviction impossible under any statute, except the 12th section of the Act of June 30th, 1864, (13 *U. S. Stat. at Large*, 222.) The case was given to the jury, on a count in the indictment founded on that section, and the prisoner was convicted. That count charged him with having had in his custody, without the written authority of the Secretary of the Treasury, or of the Comptroller of the Currency, a certain counterfeit plate or block, made after the similitude of a plate or block from which fractional notes had been printed, contrary to the provisions of the said 12th section.

BENEDICT, J. The motion in arrest of judgment is made on the ground that the 12th section of the Act of 1864 is only applicable to the case of an unauthorized possession of genuine plates, and does not provide for the offence here pre-

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sented. This point is, I am inclined to think, well taken. It is quite manifest, from the wording of the section, that the qualifying clause, "without the written authority or warrant of the Secretary of the Treasury," is intended to apply to all the plates, blocks, and electrotypes subsequently mentioned in the section. This qualification of the possession which is, by the Act, made an offence, indicates an intention to restrict the effect of the Act to the case of an unauthorized possession of such plates as may be within the authority of the Secretary of the Treasury, or the Comptroller of the Currency. Therefore, it does not cover a case of the possession of false or counterfeit plates, which cannot, under any law, be authorized by the Secretary of the Treasury, and which his warrant cannot protect. I was, at first, disposed to think that the possession of a plate in the similitude of a plate from which obligations of the Government, authorized by law, have been, or may be, printed, could only refer to counterfeit plates; but a more careful examination of the Act has satisfied me that this provision is intended to apply to the transferred plates which are used by the Department in making fractional currency, and which are, of course, genuine, although made after the similitude of other plates from which the currency may be printed. The construction thus given to the 12th section of the said Act is confirmed, by referring to the 11th section of the same Act, and to the 7th section of the Act of February 25th, 1862, (12 *U. S. Stat. at Large*, 347,) both of which provide for a case of the possession of a counterfeit plate, and make the intent to use, or suffer the same to be used, a part of the offence. In the section under consideration, an intent to use the plate is not made a part of the offence, and for the reason that, as the section is applicable only to the genuine plates, which are intended to be kept within the control of the Government, the unauthorized possession is to be considered as itself an unlawful act, without regard to any intention to use the plates.

The judgment must, accordingly, be arrested, and the prisoner be discharged.

Perry v. Corning.

JOHN S. PERRY, TRUSTEE AND EXECUTOR, &C.

vs.

ERASTUS CORNING AND OTHERS. IN EQUITY.

Where a bill, founded on the alleged infringement of a patent, contained no special allegation that a discovery was necessary, and had no special interrogatories annexed to it, but contained the usual general prayer for an answer on oath, and a prayer for an account of profits, and it was demurred to on the ground that the Court had no jurisdiction of the case made by the bill, because it did not pray for either a discovery or an injunction: *Held*, that, under the 93d Rule in Equity, the bill was a bill for a discovery and account, and that the demurrer must be overruled.

The admission of the counsel for the plaintiff, on the argument of the demurrer, that a discovery was not necessary, and that he did not seek a discovery, disregarded.

Whether the bill could be sustained as a bill for an account alone, *quere*.

(Before HALL, J., Northern District of New York, May 7th, 1868.)

THE bill in this case alleged the infringement, by the manufacture and sale of stoves, of letters patent granted by the United States, and owned by the plaintiff. It further alleged, that the defendants "did receive large profits and gains from said manufacture and sale," * * * "amounting, according to the information and belief of the plaintiff, to the sum of \$10,000;" and that, by reason of the aforesaid unlawful acts and doings of the defendants in the premises, he had "sustained great loss and damage, and had been deprived of his lawful gains and profits, in the said sum of \$10,000." After fully stating the case of the plaintiff, the bill prayed for a discovery and an account, as follows: "And, forasmuch as your orator can have no adequate relief, except in this Court—to the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief herein and hereby prayed, and may, upon their and each of their corporal oaths, and according to their and each of their

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best and utmost knowledge, remembrance, information, and belief, full, true, direct, and perfect answers make to the premises, and to all the several matters hereinbefore stated and charged, as fully and particularly as if interrogated as to each and every of said matters, and may be compelled to account for, and pay, to your orator, the profits by them acquired, amounting to the sum of ten thousand dollars (\$10,000), which your orator avers are the damages suffered by him from the aforesaid unlawful acts; and that the said defendants may be decreed to pay the costs of this suit." The bill also contains the usual prayer for general relief. To this bill the defendants demurred, on the ground that this Court had no jurisdiction of the case made by the bill.

HALL, J. Upon the argument of the demurrer, it was insisted that the bill could not be sustained, because it prayed neither for an injunction, nor for a discovery. The counsel for the plaintiff admitted that a discovery was not necessary, and that he did not seek a discovery; but he insisted that the bill could be sustained as a bill for an account alone. It may well be doubted whether, upon this demurrer, the Court can act upon the admission of the plaintiff's counsel, that no discovery is required, provided the bill itself, upon its face, requires such discovery; and my impression is, that it cannot. I shall, therefore, consider the case as made by the bill.

There is no special allegation that a discovery is necessary, and there are no special interrogatories annexed to the bill. It was, therefore, insisted, that no discovery could be required under it. The 40th Rule in Equity, while in force, relieved the defendant from making any discovery under a bill framed like the one in the present case, and containing no special interrogatories; but this Rule was expressly repealed by the 93d Rule, which provides that "it shall not hereafter be necessary to interrogate a defendant specially and particularly, upon any statement in the bill, unless the complainant desires to do so, to obtain a discovery." I am inclined to think

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that, under this Rule, the plaintiff is entitled to an answer, upon oath, to all the material allegations of his bill; and that it is, therefore, properly a bill for a discovery and account, like the bill in the case of *Nevins v. Johnson*, (3 *Blatchf. C. C. R.*, 80.) If this be so, the case last mentioned, and the cases of *Sickels v. The Gloucester Manufacturing Co.*, (1 *Fisher's Patent Cases*, 222, and 4 *Blatchf. C. C. R.*, 229,) and *Imlay v. The Norwich and Worcester Railroad Co.*, (1 *Fisher's Patent Cases*, 340, and 4 *Blatchf. C. C. R.*, 227,) would seem to be decisive of this case, and to require that the demurrer should be overruled.

There was another ground of jurisdiction insisted upon by the plaintiff's counsel, which, to say the least, is deserving of consideration. It was urged that, in an action at law for the infringement of a patent, the plaintiff can recover only the actual damages which he can prove he has sustained in consequence of the infringement; (*Hall v. Wiles*, 2 *Blatchf. C. C. R.*, 194, 201; *Buck v. Hermance*, 1 *Id.*, 398, 406; *Mayor, &c., of New York v. Ransom*, 23 *Howard*, 487;) while, in equity, he is entitled to recover the full amount of the profits made by the defendant by reason of the infringement. (*Livingston v. Woodworth*, 15 *Howard*, 546; *Dean v. Mason*, 20 *Id.*, 198.) It may often happen that the profits of the infringing defendant are much greater than any damages the plaintiff could prove he had sustained; and, in such cases, it could hardly be said that the plaintiff had a full and adequate remedy at law. In such a case, as, in matters of account, Courts of Equity possess a concurrent jurisdiction, in most cases, with Courts of law, (*Mitchell v. Great Works M. & M. Co.*, 2 *Story*, 648, 653;) it would seem that there could be little doubt of the jurisdiction of a Court of Equity to order an account. But, without deciding this question, and upon the authority of the three cases first above cited, the demurrer is overruled, with costs. (See, also, *Potter v. Dixon*, 2 *Fisher's Patent Cases*, 381, and 5 *Blatchf. C. C. R.*, 160; *Livingston v. Jones*, 2 *Fisher's Patent Cases*, 207; *Jenkins v. Greenwald*, *Id.*, 37.) The decree upon the demurrer must

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be for the plaintiff, and will be final, unless the defendants, within thirty days after notice of the order overruling the demurrer, file their answer to the bill, and pay the costs occasioned by the demurrer.

AUGUSTIN DALY v. THOMAS MAGUIRE.

In this case, the Court ordered the originals of printed exhibits, on file as parts of a deposition, to be taken from the files for the purpose of being annexed to a commission, on condition that photographic *fac-similes* thereof should first be made and placed on file, in lieu of the originals, under the direction of the clerk.

(Before BLATCHFORD, J., Southern District of New York, May 17th, 1868.)

THIS was an action for the infringement of the copyright of a play. The deposition of the defendant had been taken and filed. Annexed to it, as exhibits, were the printed programme of a performance at a theatre in San Francisco, and certain slips cut from newspapers published at that place. The plaintiff now applied for leave to take these exhibits from the files, and annex them to a commission which was about to be issued in the cause, for the examination of witnesses at San Francisco.

BLATCHFORD, J. The application is granted on condition that the plaintiff shall, under the direction of the clerk, first cause to be made and placed on file, in lieu of the original exhibits, photographic *fac-similes* thereof.

The S. L. Davis.

THE S. L. DAVIS.

A cargo of cotton belonging to the United States, on transportation, on freight, under bills of lading, on board of a vessel, from Savannah, Georgia, to New York, is liable to contribute, in a suit *in rem* against vessel and cargo, toward compensation for salvage services rendered to the vessel and cargo.

(Before NELSON, J., Southern District of New York, May 29th, 1868.)

THIS was a libel *in rem*, filed in the District Court, against the schooner S. L. Davis and a cargo of cotton, on transportation by her from Savannah, Georgia, to the city of New York, to recover for salvage services: The cotton belonged to the United States, and was shipped by a Treasury agent of the United States, under bills of lading, which provided that he should pay freight at the rate of fifteen cents per ton per day, registered tonnage, dangers of the seas excepted. The cotton was attached, in this suit, before its delivery to, or acceptance by, the agent of the United States at New York. The District Court dismissed the libel as to the cotton, holding that it was not liable to contribute, and, from such dismissal, the libellant appealed to this Court.

Charles Donohue, for the libellant.

William M. Evarts, for the United States.

NELSON, J.—The only question in this case is, whether the cotton is liable to contribute. The salvage service is not in dispute, and was exceedingly meritorious, and saved the vessel and cargo, the former valued at \$8,000, and the latter at \$150,000. The Court below allowed \$19,500 for salvage, which I think not unreasonable, regarding the condition and imminent peril of the vessel, and the value of the cargo on board.

The mere fact of the ownership of the cotton by the Gov-

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ernment, in the act of being carried to its port of destination for the purposes of a market, as merchandise, did not, I think, exempt it from the lien in case of salvage service. I shall not enter into an argument in support of this position, as the subject, or rather a kindred one—the liability of property of the Government for general average—and the present question incidentally, have been most elaborately examined by Mr. Justice Story, in *United States v. Wilder*, (3 Sumner, 308.) I am inclined, also, to the opinion, that, it is the doctrine of the Admiralty in England, (*The Marquis of Huntly*, 3 Haggard's Adm. R., 246,) and of the most approved modern elementary writers on the subject in this country. (1 Parsons' Mar. Law, book 1, chap. 9, p. 324; 2 Id., book 3, chap. 7, p. 625; Marvin on Wreck and Salvage, § 122. See, also, *The Santissima Trinidad*, 7 Wheaton, 283.)

The decree below dismissing the libel as to the cotton is reversed, and a decree will be entered charging it with contribution, with costs.

THOMAS H. LEAVITT AND FRANCIS HUNNEWELL

vs.

THE CONNECTICUT PEAT COMPANY.

What is sufficient value, in letters patent for a machine for condensing and moulding peat into convenient blocks for fuel, to constitute a consideration to support a contract in reference to the use of machines made according to the patent, discussed.

What amounts to an acceptance of the fulfilment of conditional guaranties and promises contained in a contract, discussed.

Where the by-laws of a corporation required the endorsement of its secretary on a promissory note belonging to it, payable to its order, to pass its title to such note, an endorsement by its president was held not to pass the title, where the endorsee was chargeable with knowledge of the fact that the endorsement was not made by the authority of the corporation.

(Before SHIPMAN, J., Connecticut, June 1st, 1868.)

Leavitt v. The Connecticut Peat Company.

THIS was an action of assumpsit upon two notes held by the plaintiffs. One was for the sum of \$5,000, drawn by the the Tolland County Peat Company, June 27th, 1866, payable to the order of the defendants, four months after date, and purported to be endorsed by the latter. It was payable at the First National Bank of Rockville, and was duly presented, payment refused, and protested. On this note the suit was against the defendants as endorser. The other note was for the sum of \$3,251, drawn by the defendants, and payable to the plaintiffs. On this note the suit was against the defendants as principals. In addition to the counts declaring on these two notes, the declaration contained the common counts *in assumpsit*. To this declaration the defendants pleaded the general issue, and gave notice of special matter. A stipulation was duly filed, waiving a trial by jury, and the cause was tried by the Court. Upon the evidence presented, the Court found the following facts: *First*. That the plaintiffs are citizens of the State of Massachusetts, residing at Boston, and doing business as partners, under the name of Leavitt & Hunnewell, and that the defendants are a corporation, duly organized under the laws of the State of Connecticut, and located at Hartford, in the latter State. *Second*. That Thomas H. Leavitt, one of the plaintiffs, was the patentee of a machine for condensing and moulding peat into convenient blocks for fuel, which patent was, prior to the 19th of April, 1866, owned by the plaintiffs. *Third*. That, on the 19th of April, 1866, the plaintiffs and defendants entered into a written contract, in substance as follows: *a*. The plaintiffs agree to convey to the defendants, their heirs, or to whom they or their heirs shall direct or demand, the right to manufacture peat fuel for themselves, their heirs or assigns, by the use of Leavitt's Peat Condensing and Moulding Mill, or sets of machinery, constructed for that purpose, in all the territory embraced in the State of Connecticut, except the counties of Hartford and New Haven, and the towns of New London and Waterford in the county of New London. *b*. The plaintiffs agree, further, to convey to the defendants, or to whom their heirs shall direct, on de-

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mand, and without further cost or charge to them, all the improvements in the manufacture or in the machinery to manufacture peat fuel, that shall be made by T. H. Leavitt, or of which the plaintiffs shall become possessed, for the territory aforesaid. *c.* The plaintiffs agree to furnish Condensing and Moulding Mills of the character named, to the defendants, for the use of the latter, at \$600 each, and to the defendants, for sale to others, to be used in said territory, at \$400 each, the same to contain all new improvements, at an additional cost not exceeding the cost of constructing each improvement, the defendants in no case to sell to others such mills at a less price than \$600 for each. *d.* The plaintiffs agree to protect the defendants in the exclusive use of such mills, either by themselves or their assigns, in the territory named. *e.* The defendants agree to pay to the plaintiffs "one thousand dollars within ten days after the execution of this instrument, and if, on full and fair trial, to be made within ninety days from the date hereof, (April 19th, 1866,) of a mill or set of machinery, which is now being constructed by the plaintiffs for the defendants, for the manufacture of peat fuel, it shall be found that said mill is capable of turning out forty tons of wet peat per day, yielding, ordinarily, when taken from a well-drained bog, from ten to twelve tons of hard, dry fuel, and will generally accomplish all, or substantially all, which is claimed and set forth in a certain pamphlet, entitled 'Leavitt's Condensing and Moulding Mill for the Manufacture of Peat Fuel,' which statements therein contained are signed 'Leavitt & Hunnewell, agents of the Boston Peat Co.,' then, by the conveyance by the plaintiffs to the defendants, by good and valid deed of assignment, of the territory aforesaid, (and which shall be conveyed on demand,) the defendants shall and will pay to the plaintiffs in cash, or good approved paper on interest, the sum of \$11,500, with interest from the date hereof, and will further pay over to the plaintiffs the one-half the cash receipts from the sale of territorial rights hereby agreed to be conveyed, and from the profits accruing from the development of this enterprise, so fast as the

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same shall be collected, until the plaintiffs shall have been paid the additional sum of \$12,500 more." *f.* The defendants agree to convey, on demand, to the plaintiffs, the exclusive right, outside of the State of Connecticut, to the use of all improvements in said machine, or in the manufacture of peat, which the defendants shall invent or become possessed of. *g.* It is further agreed, mutually, that if, on said trial of said set of machinery, as aforesaid, it shall fail to accomplish substantially the work as claimed for it in the pamphlet above referred to, then, in that event, the plaintiffs will, on demand, refund and pay back the one thousand dollars, paid as stipulated herein, and this agreement shall become void. *Fourth.* That, among other material representations contained in the pamphlet referred to in the above-named contract, and upon which the defendants relied, was this, that the set of machinery for condensing and moulding peat, referred to therein, was capable of turning out forty tons of wet peat per day, yielding ordinarily, if cut from a well-drained bog, a result of about ten or twelve tons of hard, dry fuel, at a cost, for labor, of less than two dollars per ton. *Fifth.* That the defendants paid the first installment of \$1,000, as provided by said contract, and received from the plaintiffs a set of said machinery, as provided for in said contract, soon after the same was entered into, and proceeded to give it a trial, and that they experimented with it, from time to time, for several months, and down till some time in the month of October, but the machinery failed to turn out forty tons of wet peat per day, when cut from a well-drained bog, capable of making ten or twelve tons of hard, dry fuel, at an expense for labor of less than two dollars per ton; and that, on the contrary, said machine, though worked with adequate power, and under reasonably favorable circumstances, such as the parties in their contract understood to be necessary, proved wholly incapable of accomplishing the above result, both as to the quantity of wet peat produced, and the quantity of hard, dry fuel resulting therefrom, and also as to the expense of production. *Sixth.* That, though the aforesaid trial of said ma-

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chine wholly failed to accomplish the results which the plaintiffs represented in their said contract and pamphlet it was capable of performing, said representations were not made by the plaintiffs fraudulently, or with intent to deceive the defendants. *Seventh.* That the defendants did not, within the ninety days named in said contract, nor at the expiration thereof, nor at any time, revoke said contract, or demand back the one thousand dollars paid thereon; nor did the defendants, within said ninety days, or at the expiration thereof, or within any reasonable time, notify the plaintiffs that they, the defendants, refused, or should refuse, to complete said contract according to its terms. *Eighth.* That, on the contrary, the President and Secretary of the defendants, on the 13th of July, 1866, delivered to the plaintiffs notes to the amount of seven thousand seven hundred and forty-nine dollars, (\$7,749,) as part payment on said contract, upon which notes the plaintiffs subsequently realized cash to their full amount; that the defendants have ratified such payment; and that other payments were made prior to the last-mentioned date, in addition to the first \$1,000. *Ninth.* That, on the 9th of August, 1866, the defendants paid the plaintiffs the further sum of \$2,000, in cash, on said contract, and delivered the note for \$3,251, embraced in this suit. *Tenth.* That, on the 9th of August, 1866, there was due to the plaintiffs, on the \$12,500 to be paid them absolutely under the contract, in case the trial of the machine, to be made within ninety days, proved satisfactory, as set forth in the contract, the sum of \$2,251, and no more; that there was then nothing due to the plaintiffs on account of cash received by them for the sale of territorial rights, or on account of "profits accruing from the development of this enterprise;" that there is nothing now due to the plaintiffs from the defendants on any account whatever, except the said \$2,251, with interest thereon; and that the note in suit, for \$3,251, was made for that sum through error, and should have been for only \$2,251. *Eleventh.* That the note of \$5,000, upon which the defendants are sued in this action as endorsers, was, with several other notes, drawn by

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third parties, and made payable to the order of the defendants, and endorsed by James H. Ranney, the President of the defendants, and endorsed in no other way; that the said Ranney had no authority from the defendants, either express or implied, to make said endorsement; that the defendants have never ratified such endorsement, and never knew of it until the trial of this case; that said note was received by the plaintiff Thomas H. Leavitt, from the hands of said Ranney, on the 13th of July, 1866; and that, by the by-laws of the defendants, the Secretary alone was authorized to endorse the paper of the company, or that held by them. *Twelfth.* That, from time to time, in May and June, 1866, the defendants entered into contracts with third parties, underselling territorial rights for parts of the territory embraced in the contract between them and the plaintiffs of April 19th, 1866; and that, on the 13th of August, 1866, the defendants received and accepted from the defendants the conveyance of the territorial right, according to the provisions of the contract of April 19th, 1866. *Thirteenth.* That, before the execution of said contract of April 19th, 1866, the plaintiffs were, and ever since have been, stockholders of the defendants, the Connecticut Peat Company, and, before said last-mentioned date, and down to the month of December, 1866, the said Thomas H. Leavitt, one of the plaintiffs, was a director of said company. *Fourteenth.* That, on the trial of said cause, the plaintiffs proved the execution and delivery of said note for \$3,251, and the delivery by James H. Ranney of the said note for \$5,000, with his endorsement thereon, and that the latter was duly presented for payment, payment refused, and the same duly protested, and then rested their case; that, at a subsequent stage of the trial, and after the defendants had proceeded with their evidence, the plaintiffs further claimed a recovery for two machines, alleged to have been delivered by the plaintiffs to one Lewis, on the order of the defendants; and that, if said delivery of said machines to Lewis was ever made on the order of the defendants, the plaintiffs, before the bringing of this suit, revoked the same, and claimed said two

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machines as still their own property. *Fifteenth.* That the consideration of said purchase of the right for the territory named in said contract did not wholly fail; that, though the patent which the plaintiffs sold to the defendants was of small value, yet it was worth something, and, therefore, constituted a valid consideration upon which the contract must be supported; and that, though the plaintiffs greatly overrated the value of their machine and patent, there is not sufficient evidence to support the charge of fraud in the original sale, as set up by the defendants. *Sixteenth.* That the charge set up by the defendants, that the plaintiffs made other fraudulent representations, such as that they falsely stated that they were in receipt of letters from other parties, assuring them that the machines were working successfully, and performing all that the plaintiffs had promised, and more, is not proven; and that the charge of conspiracy is not proven. *Seventeenth.* That, though the plaintiffs signed the contract of April 19th, 1866, as agents of the Boston Peat Company, yet the defendants, in fact, dealt with them as principals.

SHIPMAN, J. The transactions out of which this controversy has arisen, had their origin in the facility with which mankind embrace the most delusive schemes for the sudden accumulation of wealth. The community at large, as well as Courts of justice, are kept familiar with the fact, that experiments of the most imperfect and inconclusive character are constantly made the basis of extravagant expectations of pecuniary advantage, which are never realized. Men whose good sense, integrity, and sound practical judgment for a long course of years, command the respect and confidence of the community, and the rewards of successful business prudently conducted, are induced, not unfrequently, to suddenly engage in enterprises based upon untried theories. The imagination becomes inflamed with apparent prospects of boundless wealth; and solid capital, the fruit of hard toil and strict economy, is credulously ventured in the prosecution of schemes which prove as unsubstantial as a dream.

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The parties awake sooner or later, to find the reality in the presence of the bailiff and in a dismal accounts of debts incurred and money gone never to return. The histories of John Law, of the South Sea bubble, of the tulip-mania, and of the *morus multicaulus* fever, have been written in vain. Each generation has its own El Dorados, wherein it invests a portion of its capital and hopes, and in exploring which it learns, by costly experience, the lessons which recorded examples have failed successfully to teach. The record of past delusions did not prevent one relating to peat from taking possession of not a few minds, as the disclosures of this trial have shown.

It appears, from the evidence, that one of the plaintiffs in this suit, after having made the subject of the preparation of peat for fuel a matter of study and experiment for a considerable time, invented, in 1865, a machine for grinding the article and forming it into blocks or bricks, of convenient size to be dried, handled, and used for fuel. This machine was to be operated by steam power. He put it into operation near a peat meadow or bog, in Lexington, Massachusetts, for the purpose of experimenting and testing its value. He evidently thought it was eminently successful, and obtained a patent for his invention. So well satisfied was he with the result of numerous trials made during the summer and autumn of 1865, that though, as he testified on the stand, the machine could be run, under favorable circumstances, at a net profit of from fifty to one hundred dollars per day, the manufacture of fuel became a matter of minor importance to him individually, and he turned his attention to the sale of rights under his patent and to furnishing machines to others. He expected to realize large gains in the sale of his rights and machines, and no doubt thought that others would share, to some extent, in the profits of what he termed, in one of his letters to the plaintiffs, the "grand movement in peat." In some way he was brought into communication with gentlemen residing in this State, and, by elaborate printed statements, and in other ways, set forth to them the value of his invention. The result was the formation of

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the Connecticut Peat Company, the defendants in this suit, to whom the territorial right for the patent for the whole State, except the counties of Hartford and New Haven, and the towns of New London and Waterford, was sold for the sum of \$25,000, one-half to be paid on a successful trial of the machine, to be made within ninety days, and the other half out of the cash receipts coming from the sale of territorial rights which the Connecticut Peat Company might sell within the State, or out of profits. In addition to this, the defendants were to have the privilege of purchasing machines of the plaintiffs, for their own use, at \$600 each, and for sale to others to use within the State, at \$400 each, but were to sell the same only at an advance of \$200 or more. Through statements put forth in correspondence, in pamphlets, and in the public journals, by the spring or early summer of 1866, public expectation was raised so high, that rights under the plaintiffs' patent were eagerly sought for. The defendants secured the right for the remaining counties, Hartford and New Haven, at a considerable advance in price over what the plaintiffs had sold the same for. The defendants also sold to one or two persons in Tolland county the right for that county, for \$9,500, which was, in a very short time, resold to the Tolland County Peat Company, for the sum of \$35,000. Corporations were organized for the manufacture of peat fuel, in various places in the State, in a number of which works were erected and equipped with sheds, steam engines, tramways, crates, &c., for the successful prosecution of the business. The capital stock of these corporations ranged from \$25,000 to \$100,000. Peat morasses suddenly assumed a new value, and swamps which had hitherto been left in the undisturbed possession of frogs and turtles, were about to prove equivalent to coal mines, and to become sources of great profit to those who should work them. It was under the influence of this delusion that most of the facts enumerated in the finding of this Court in the present case occurred. Justice to both parties requires this brief statement of the condition of things at the time, in view of the fact that not only has no money been made in the business, but thousands

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of dollars have been lost in demonstrating that none could be made by the use of this machinery, in the present state of practical knowledge on the subject, in Connecticut. The whole thing in this State seems to have been abandoned as a failure, after repeated experiments, by which the cost of manufacture has been proved to greatly exceed the value of the article produced.

The legal questions arising out of the finding of the Court can be easily disposed of. The charges of fraud and conspiracy are negatived. The allegation of total failure of consideration is also negatived. Though the value of the patent right was grossly exaggerated, yet it had, in the hands of the defendants, at least a market value, as is proved by their sales and the sales of others. There is, also, some little evidence tending to show that those thoroughly acquainted, by experience, with the working of peat into fuel, may derive some advantage from the use of this machine, when it is employed under the most favorable circumstances. There is, therefore, a consideration to support the contract.

The question of warranty was discussed at length on the argument, but it is sufficient to say that, assuming that the representations made by the plaintiffs amounted to warranties, they were, by the terms of the contract, conditional and limited. The trial was to be made in ninety days from the date of the contract, and the defendants made that trial in such manner as they saw fit. If they were dissatisfied with the result, they should have notified the plaintiffs, or least ceased to proceed any further in the execution of the contract. Instead of that, they continued their experiments, received, without objection, the transfer of the right, which they never tendered back, and, even after a majority of the directors had knowledge, in August, 1866, that the first \$12,500 had been overpaid, through their secretary, in cash and a note of the company payable on demand, they took no steps to disavow his acts to the plaintiffs. At least, they are fairly chargeable with this knowledge, for they had then discovered that the president and secretary had delivered a large amount of notes

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to the plaintiffs, besides the cash payments which had been made, and that the secretary, as they supposed, had endorsed notes to the amount of \$25,000 more, or thereabouts, in which the company had no real interest. They were, therefore put on enquiry, and it would be imputing to them gross negligence and inattention to their own interests, which were involved in the interests of the company, not to assume that they made themselves acquainted, at that time, with the financial condition of the latter. It may seem strange that, with the result of their experiments before them, they did not then endeavor to revoke their contract, or relieve themselves from any further obligations under it. But, perhaps, a solution of this mystery may be found in the remark of one of the directors on this trial, who testified, in answer to the question put by the Court, why they did not take immediate steps to disavow the acts of their secretary, and repudiate the contract, that "they did not wish to make a noise, as they were selling rights, and must keep up appearances." The defendants must, therefore, in judgment of law, be deemed to have accepted the result of their trial of the machine, as a fulfilment of the promises implied in the conditional guaranties of the contract. They not only paid large sums on the contract after the ninety days had expired, but were in the market with rights for sale, and, on the 13th of August, received from the plaintiffs the final transfer of the patent, as provided for by the contract. True, it appears that the defendants did not fully realize their condition till near the last of August, but, even then, when they had ascertained the state of affairs, they made no attempt to rescind the contract, or relieve themselves from its obligations. From the facts formally found by the Court, the deduction is irresistible, that they accepted the contract as fulfilled on the part of the plaintiffs. The law can put no other construction upon their acts. They are, therefore, legally bound to pay the \$2,251 found by the Court to be due on the first \$12,500. The plaintiffs must, therefore, recover to that extent on the note for \$2,251.

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The note for \$5,000 stands upon different ground. This was given by the Tolland County Peat Company to the defendants, payable to their order. It was endorsed by Ranney as president, and by him only. According to the by-laws of the defendants, this note could only be endorsed by the secretary; and the plaintiff Leavitt, as a director of the company at the time he received the note from Ranney, is chargeable with knowledge of the fact that it was not endorsed by the defendants, or by their authority, and his co-plaintiff is chargeable with this knowledge of his co-partner. This attempt of Ranney to endorse the paper of the company was not known to the defendants till this trial. They have, therefore, never ratified his act. It follows, that the plaintiff has no legal title to this note, and cannot subject the defendants as endorsers thereon.

Neither can the plaintiffs recover the amount of the note, or any portion of it, under the count for money had and received, the only one appropriate to the claim made. There is nothing due to them for cash received by the defendants, either for territorial rights sold, or for "profits accruing from the development of this enterprise." They have paid over one-half of the cash received for rights, and there are no profits. If the note were cash in the hands of the defendants, the plaintiffs would be entitled to only one-half of the amount, by the terms of the contract. But it is not cash, and neither the directors of the company nor the plaintiffs have any right to treat it as cash. Whether this note is collectable by the defendants, and it is, therefore, their duty to enforce its collection, does not appear clearly, and cannot be determined in this suit.

The claim of \$800 for the machines alleged to have been delivered to Lewis, on the order of the defendants, is rejected. It was not put in evidence by the plaintiffs in their original proofs. Besides, if the sale to Lewis was made on the order of the defendants, the plaintiffs have revoked that sale, and set up their own title to the machines.

Let judgment be entered for the plaintiffs, to recover the sum of \$2,492.94, with costs.

Drake v. Goodridge.

JAMES DRAKE AND OTHERS

vs.

FRANCIS GOODRIDGE AND OTHERS. IN EQUITY.

Where, in a suit in equity, brought by alien plaintiffs against citizens of New York, a person, not stated to be a citizen of New York, applied to be made a party to the suit: *Held*, that he could not be made a defendant, because that would oust the jurisdiction of the Court.

The Act of February 28th, 1839, (5 *U. S. Stat. at Large*, 321,) explained.

No such practice is known, in equity, as making a person a defendant to a suit, on his own application, or as compelling a plaintiff to join, as co-plaintiff, a person not a party, on the application of such person.

(Before BLATCHFORD, J., Southern District of New York, June 2d, 1868.)

THIS was a petition by two persons, Morgan and Gooch, to be made parties to this suit, which was a bill filed by aliens against citizens of the State of New York. The application was opposed by the plaintiffs.

Charles Tracy, for Morgan and Gooch.

Edwin W. Stoughton and *Clarence A. Seward*, for the plaintiffs.

BLATCHFORD, J. As the plaintiffs are stated in the bill to be aliens, and Morgan and Gooch are not stated to be citizens of the State of New York, to make Morgan and Gooch defendants to the suit, would oust the jurisdiction of the Court. Consent cannot confer jurisdiction. The Act of February 28th, 1839, (5 *U. S. Stat. at Large*, 321,) applies only to a voluntary appearance by a person who is, in fact, made a defendant by the plaintiff's bill. Here, Morgan and Gooch are not made defendants by the bill, and cannot be made so, without ousting the jurisdiction of the Court. The

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Act of 1839 does not apply to a case where persons are not made defendants because their citizenship is such that their joinder would defeat the jurisdiction of the Court, but it only removes a difficulty as to jurisdiction between competent parties. (*Shields v. Barrow*, 17 *How.*, 130, 141.) The prayer of the petition of Morgan and Gooch is, that they may be made parties to the suit, and may have leave to file a supplemental bill of complaint. Independently of the difficulty as to jurisdiction, in case Morgan and Gooch were made defendants, it would not be proper to make them defendants on their application. No such practice in equity is known. I had occasion to examine this question recently, in the case of *Coleman v. Martin*, (*ante*, p. 119,) in this Court.

But Morgan and Gooch ask, in case they cannot be made defendants, to be made co-plaintiffs. I know of no practice which would authorize the Court, on the application of persons not parties to a suit, to compel the plaintiffs to join such persons as co-plaintiffs.

As the bill now stands, the rights of Morgan and Gooch, if they have any, cannot be prejudiced or affected by any decree which may be made in the suit; and they are at liberty to institute a suit of their own, in the proper forum, to enforce their rights.

Of course, in deciding on this application, I do not intend to dispose of any objection which may be properly taken, for want of proper parties, by any person whom the plaintiffs have made a defendant to the suit.

The prayer of the petition is denied.

Remington v. The Atlantic Royal Mail Steam Navigation Company.

JOSHUA REMINGTON AND OTHERS

vs.

THE ATLANTIC ROYAL MAIL STEAM NAVIGATION COMPANY.

Where, on a libel *in personam*, in the District Court, against a corporation, for a collision alleged to have been caused by a vessel owned by it, the libel was dismissed by that Court, on the ground that there was no such corporation, and that it did not own such vessel, and no testimony was put in in that Court as to the merits, by the respondents, and, on appeal by the libellants to this Court, such objections were removed by evidence, this Court, on reversing the decree, allowed both parties to take proofs on the merits, in this Court, with liberty to either party to amend his pleading.

(Before NELSON, J., Southern District of New York, June 8th, 1868.)

THIS was a libel *in personam*, filed in the District Court, to recover damages for a collision, alleged to have been caused by the steamship Indian Empire, a vessel owned by the respondents, a corporation. On the hearing in the District Court, objections to a recovery, on the ground that there was no such corporation as the respondents, and that they were not the owners of the vessel in question, were sustained, and the libel was dismissed on those grounds, without any testimony having been put in on the part of the respondents, in respect to the merits. The libellants appealed to this Court, and, by further testimony, taken on the appeal, the objections in question were removed.

Charles Donohue, for the libellants.

Erastus C. Benedict, for the respondents.

NELSON, J. The decree of the Court below must be reversed, but I have had some difficulty as to the further disposition of the case. The only evidence found in the record, in

The Morning Star.

respect to the collision, is that given by the master of the libellants' vessel. In view of the grounds on which the Court below disposed of the case, I am inclined to think, that that evidence ought not to be received here as plenary proof of the collision, on this appeal. I shall, therefore, direct the case to stand, for proofs to be taken by the respective parties in this Court, upon the merits, with liberty to either party to amend his pleading, preparatory to the taking of the proofs.

THE MORNING STAR.

Where a corporation, having authority, by its charter, to own vessels to be employed in saving vessels wrecked or in distress, and to take all compensation and salvages which, by law and usage, enure to private persons, was employed by the owners of a vessel which had gone on shore in a fog, to relieve her from a situation of peril, and did so: *Held*, That compensation for the service ought to be allowed to the corporation on the principle of allowing a liberal compensation for the use of the apparatus furnished, and for the skill with which it was handled in the service performed, but not on the principles governing the rate of compensation in the case of a salvage service.

In this case, the Court allowed what it regarded as a reasonable compensation for the work and labor performed and the materials used.

(Before NELSON, J., Southern District of New York, June 8th, 1868.)

THIS was a libel *in rem*, filed in the District Court, to recover salvage for saving the steamship Morning Star, which ran aground on Deal Beach shore, New Jersey, about forty miles from the city of New York, on the 31st of July, 1863. The vessel was valued at \$150,000, and her cargo at \$200,000. The libellants were a corporation created under the laws of the State of New York, with authority to own vessels to be employed in "towing, aiding, protecting, and saving vessels and cargoes wrecked or in distress, wherever such wrecks occur, on the high seas, or in the various arms of the seas, rivers running to the same," &c. The Act of incorporation also allowed the company, among other things, to "take all com-

pensation, towages, and salvages which are customary and usual, and which, by law and usage, enure to private persons," &c. The District Court awarded to the libellants \$2,500, and interest, and the libellants appealed to this Court.

Clifford A. Hand, for the libellants.

Robert D. Benedict, for the claimants.

NELSON, J. The libellants were employed by the owners of the *Morning Star* to go down from the city of New York and relieve her from her perilous situation on the beach. This was done with expedition and skill, by the use of appliances kept on hand by the company. The vessel had gone on the beach in a fog, and, although there was a considerable swell upon the sea, the wind was light, and very little difficulty was encountered in towing her from the sandbar on which she grounded and setting her afloat. She sustained no injury.

The Court below allowed, as compensation to the company, for the service rendered, \$2,500, and interest. There is evidence in the case that the owners of the vessel, when applied to by the company to perform the service, had inquired as to the expense; and that, although no definite answer was given, \$2,000 or \$2,500 was suggested as the probable amount. There is no proof in the case but that this would be a reasonable compensation, as for work and labor; that is, there is no evidence to the contrary. As a salvage service, I think the sum allowed was inadequate, upon the principles governing the rate of compensation in that class of cases.

The learned judge below appears to have been strongly inclined against regarding this company as a salvor, within the reasons and principles which govern the Admiralty, in awarding compensation for admitted salvage service. All the persons representing the company, engaged in the service in question, receive no part of the salvage money. They are employed at a permanent salary, or, if temporarily, for the given service, at days' wages. All considerations, therefore,

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of personal sacrifice or gallantry, in encountering imminent perils in rescuing vessels in distress, are necessarily excluded, in fixing the rate of compensation. If allowed by the Court, all beyond the salaries or wages enure to the benefit of the company. I agree that a liberal compensation should be allowed for the use of the apparatus furnished, which was ample and well adapted to the purposes intended, by the present company, and for the skill with which it was handled in the service performed; but, in the sense of the law governing salvage compensation, I have great difficulty in awarding it to the libellants. As at present advised, I must deny it; and as, for aught that appears, the compensation allowed by the Court was reasonable for the work and labor and materials used, the decree below is affirmed.

JOHN SEDGWICK

vs.

WILLIAM MENCK AND CHARLES B. BOSTWICK. IN EQUITY.

In 1857, B., being insolvent, made an assignment of his property to M., giving preferences among his creditors. Under creditors' bills, filed against B. and M., C. was appointed receiver of the property of B. Afterward, C. brought a suit, as such receiver, in a State Court, against B. and M., to recover the assigned property, and obtained a judgment, in 1858, adjudging the assignment to be fraudulent and void against the creditors of B. From that judgment, M. appealed, and the case was now pending on appeal. In 1868, B. was adjudged a bankrupt, and S. was appointed his assignee in bankruptcy. S. then, as such assignee, brought a suit in this Court, against M. and C., to compel C. to deliver up to S. the property in the hands of C., as receiver: *Held*, that the suit could not be maintained.

(Before NELSON, J., Southern District of New York, June 22d, 1868.)

- On the 6th of January, 1857, Andrew Beiser, being insolvent, made an assignment of his property, real and personal, to William Menck, giving preferences among his

creditors. Creditors' bills were filed against Beiser, the debtor, and Menck, the assignee, under which Charles B. Bostwick was appointed receiver of the property. On the 16th of March, 1858, he commenced a suit, in the Court of Common Pleas for the city and county of New York, against Beiser and Menck, to recover possession of the property, and such proceedings were had, that, on the 9th of December, following, a judgment was rendered in favor of the receiver, adjudging the assignment fraudulent and void against creditors. From this judgment Menck appealed to the Court of Appeals, where the case was still pending. In January, 1868, Beiser was adjudged a bankrupt, and the plaintiff was appointed his assignee. The plaintiff then brought this suit against Menck and Bostwick, to obtain possession of the assets of the estate. An injunction having been granted, the defendants now moved for its dissolution.

Francis N. Bangs, for the plaintiff.

C. Bainbridge Smith, for the defendants.

NELSON, J. The filing of the creditors' bills gave, according to the law of New York, a lien upon the assets of the debtor, in behalf of the judgment creditors; and the receiver, representing their interests, has, it appears, been diligently engaged in endeavoring to reduce them to possession, and apply them to the payment of the judgments. It is difficult to see what right exists in the assignee in bankruptcy to this property, thus devoted by the law to the payment of the debts of these judgment creditors, some ten years before any right attached in bankruptcy. The judgment creditors have been subjected to very considerable expense, already, in the litigation, and have succeeded, in the lower Courts, in setting aside the assignment, as fraudulent, and thereby giving effect to their judgments against the property. Whether they will derive any benefit from the expense and trouble, must depend on the decision of the appellate Court. It seems to me,

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that they are entitled to, at least, this chance, and that the bankrupt's assignee is neither entitled to it himself, nor in a position to deprive them of it. The question involving the right to this property is in the State Court, where it belongs, and the decision of that Court will be conclusive upon the right. If it shall be in affirmance of the judgment of the Court below, the property will be applied to the satisfaction of the judgments, on the creditors' bills. If it shall be in favor of the validity of the assignment, the property will take the direction given to it by the trusts created in the assignment. The right to this property attached long before the assignment in bankruptcy was made, and even before the passage of this bankruptcy law. The motion to dissolve the injunction is granted.

JOHN FLINT

vs.

THE NORWICH AND NEW YORK TRANSPORTATION COMPANY.

The owner of a steamboat, who undertakes to transport a passenger thereon, for hire, is bound to exercise the utmost vigilance and care in maintaining order and guarding such passenger against violence which may reasonably be anticipated, or naturally be expected to occur, in view of the number and character of other passengers on board.

His obligation, in such respect, is the same, even though such other passengers are soldiers, carried on compulsion.

The rule of damages, if the carrier is guilty of negligence, which causes a personal injury to the passenger, stated.

(Before SHIPMAN, J., Connecticut, June 27th, 1868.)

SHIPMAN, J., in this case, charged the jury as follows :

There are a number of facts, touching this interesting and important case, which is now finally to be submitted to you, about which there is no serious dispute. The plaintiff, a

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physician, residing in Boston, left his home, for New York, on the 6th. of June, 1864. Before leaving, he purchased a through ticket, called a coupon ticket, by which he became entitled to a passage from Boston to Worcester, over the Boston and Worcester Railroad; from Worcester to Norwich, over the Norwich and Worcester Railroad; from Norwich to New London, over the Northern Railroad; and from New London to New York, through the Sound, on one of the defendants' passenger boats. He passed safely over the route from Boston to New London, where he arrived not far from half-past ten or eleven o'clock, in the evening, left the cars, and proceeded on board of the defendants' boat, the steamer City of Boston, which was then lying at the dock, with steam up, ready to start as soon as the passengers by the train, with their luggage, and some express freight, should be taken on board. The plaintiff, with other passengers, one of whom was a lady under his charge, went upon the main deck of the steamer, through her after starboard gangway. He proceeded, with the lady, through or along with a crowd of passengers, passed up the stairs, to the upper saloon, and, after some little time, leaving the lady, returned to the main deck, and went to the ticket office, to receive his state-room key, to which his ticket entitled him. He obtained the key, and proceeded to return from the ticket office to the upper saloon, by the proper route. When he had gone a short distance from the ticket office, and before he had reached the stairs, a loaded musket fell from the hands of a soldier, or non-commissioned officer, or was thrown down, and was discharged as it fell, and the ball passed through the foot of the plaintiff, just back of the toes, shattering the bones, and causing a dangerous wound, from which he suffered severely, for a long time. Finally, to save his life, as advised by his surgeons, he was compelled to have his foot amputated. He suffered for a period of nearly three months, and incurred expenses, in a city distant from his home. His activity and capacity for business and professional usefulness have been more or less permanently impaired. He claims that this injury, with all its serious conse-

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quences, was the result of a breach of duty on the part of the defendants, and, to recover proper damages therefor, he has brought this suit. The burden of proof is on the plaintiff, and it is now for you to say, whether or not, on the whole evidence, the claim of the plaintiff is well founded. The rules of law, which you are to apply as tests to this evidence, I will refer to particularly hereafter.

As I have already stated, before the arrival of the train which brought the plaintiff to New London, the steamboat was at the dock, with steam up, ready to start, when the passengers, the luggage, and the express freight from the train should all be on board. She had been lying there for some time. Between nine and ten o'clock, an hour or more before the train arrived, a detachment of United States soldiers, from Fort Trumbull, about sixty-three in number, with several non-commissioned, and two commissioned officers, went on board, and were there when the train arrived. Some fourteen to eighteen of these soldiers were armed with muskets, loaded and capped, and furnished with bayonets. They were detailed as guard over the rest, who were unarmed. Witnesses, called by the defence, state, that this detachment was placed on the main deck, forward of the engine room; that armed sentries were stationed, to keep them there; that a sentry was placed on each side of the engine room, to prevent them from going aft; and that two sentries were stationed at the forward starboard gangway, and one at the head of the stairway leading from the forward part of the main deck to the cabin below. Some of these witnesses say, that a sentinel was also placed at each of the two ladders which led from the forward part of the main deck to the saloon deck above. This was substantially the condition of things on the boat down to, or near to, the time when the train which brought the plaintiff arrived. On this train came a large number of passengers, among whom were about one hundred and fifty soldiers, in a detachment, under the command of officers, and who were ultimately marched on board, at the forward gangway. By the same train came, also, about

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a dozen or twenty soldiers, travelling, apparently, as ordinary passengers. These also went on board, but whether by the forward, or the after, gangway, it may be proper for you to consider, in deciding upon the conflicting evidence touching the condition of things on the after part of the deck, where, and at the time, the passengers were coming on board, and getting their tickets and state-room keys. The train having arrived, the plaintiff proceeded on board, by the proper entrance. Here the duty of the defendants toward him, as a passenger, commenced. They undertook to transport him, for hire, and were bound to secure him a safe passage, so far as that could be done, by the exercise of due care on their part. This was a duty imposed upon them by their contract, and by law. The precise rule of duty to which they are to be held, and which you are to apply to the evidence, in deciding whether or not they are liable in this action, is this: The defendants were bound to exercise the utmost vigilance and care, in maintaining order, and guarding the passengers against violence, from whatsoever source arising, which might reasonably be anticipated, or naturally be expected to occur, in view of all the circumstances, and of the number and character of the persons on board. Now, the plaintiff has testified, and has called a number of witnesses, who, he claims, substantially concur to the same points, that, immediately upon stepping upon the boat, he found himself in a dense crowd of persons, many of whom, like himself, were civilian passengers from the train, but among whom were a number of soldiers, some of them armed, who were boisterous, some evidently intoxicated, quarrelsome, profane, and exhibiting more or less disposition to rudeness and violence, by scuffling and jostling one another and the civilians. The plaintiff claims, that the evidence touching this part of the case proves, that this disorder and uproar continued for from fifteen minutes to half an hour, until he returned from the upper saloon to seek his key, and until the discharge of the gun by which he was wounded; that, during all this time, no efforts were made, by the servants of the defendants, to quell this

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disturbance; and that it finally terminated in this injury to him. Now, if all these facts are, in your judgment, substantially proved, you will have a right to infer negligence on the part of the defendants, and hold them liable. If disorderly men, armed with loaded muskets, were in the space through which the passengers had to pass, it was the duty of the defendants to see that they were removed before the passengers came on board, or that the latter were notified of the danger, or that adequate protection was furnished. If armed and boisterous and quarrelsome soldiers rushed into the space referred to, after the passengers had begun to come on board, and produced and continued an uproar there, it was the duty of the defendants, through the officers and hands of their boat, to make every effort to quell the disturbance, and protect their passengers from violence and danger, and to call upon the military officers to enforce discipline.

But the defendants give a very different version of the events of that night. They claim to have proved, by their witnesses, that the space where the passengers from the train came on board was clear, at least of soldiers, when they arrived; that there was no soldier, armed or unarmed, upon that part of the boat, at that time; and that, if any soldiers came in with, or among, the passengers, as they were pressing on to the boat, they were few in number, unarmed, and travelling as ordinary passengers, and behaved as peaceably as the civilians did. They further claim, that they have shown, by their witnesses, that, soon after the passengers got on board, one of the unarmed recruits, from Fort Trumbull, undertook to pass the sentry on the port side of the engine room, and was repulsed; that he repeated the attempt, and again failed; that he finally returned, with several of his companions, and overpowered the sentinel; that then he, or they, rushed aft, near to or into the space where the passengers came on board; that several of the guard followed, when a scuffle ensued, near the saloon stairs, between the insubordinate recruit or recruits, and the pursuing guards; and that it was in this brief, or, as the defendants claim, moment-

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ary, struggle, that the gun by which the plaintiff was shot was dropped, or thrown down.

Now, it is for you to say which of these versions is correct. As I have already said, if disorderly soldiers, armed with loaded muskets, occupied the space where the passengers came upon the deck, and no notice was given to the passengers of that fact, so that they might avoid the danger; or, if such soldiers rushed in upon that space, while the other passengers were coming on board, and securing their keys or tickets, and conducted in a quarrelsome and disorderly manner for a considerable time, during which the plaintiff was shot, without any effort on the part of the officers or crew of the defendants to suppress the disorder and protect the passengers, or induce the military officers to do so, and the plaintiff was injured in consequence, then you have a right to hold the defendants liable. If, on the other hand, the version given by the defendants' witnesses is the true one, then you will proceed to another inquiry, that is, whether, in this aspect of the case, the defendants did exercise their utmost vigilance and care, in maintaining order, and guarding the passengers against violence, from whatever source arising, which might reasonably be expected to occur, in view of all the circumstances, and the number and character of the persons on board. If they did this, or if it was done by the military, the defendants are not liable. If such vigilance and care were not exercised, and the plaintiff was injured in consequence, then the defendants are liable, and your verdict must be for the plaintiff.

And here it is proper that I should notice a circumstance set up by the defendants. They say, that they had no alternative but to take these soldiers from Fort Trumbull, who caused, as they assert, this disturbance, and this injury to the plaintiff; and that they were compelled to take them on this boat, by military coercion. You may assume that fact as proved, but this will not vary the liability of the defendants under the present circumstances. They took the plaintiff as a passenger, voluntarily, after this detachment was on board,

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and without notice to him; and their obligations to him were just the same, whether they took the Fort Trumbull troops voluntarily, or under compulsion. Those troops were on board long before the plaintiff was, the defendants knew the fact, no notice was given to the plaintiff, and they were bound to take such precautions for the protection of the civilian passengers, as were demanded by the rule I have laid down. They say that they did take them, or see that they were taken; and that the presence of the armed sentinels, at the points stated by the witnesses, to keep the soldiers in their proper place, was all that the highest vigilance and prudence required. The guard was not under their command, and the only apparent additional precautions that the defendants could have taken, that occur to me, (you will say whether they could have taken others,) would have been to apply to the military officers to have the sentries increased in number, or to place men, officers of the boat, or hands, under their own control, at the passages, to support the armed sentries, in case of difficulty, and to act as an additional guard, and to quell any violence that might occur, as a more secure protection to the passengers. I do not say that this was, or was not, their duty. It is for you to determine. It is exclusively for you to say what their duty was—whether the condition of things on board of the boat, before the train arrived, required them, in anticipation of its arrival, to take these, or any other precautions, beyond what were taken; and, consequently, whether their neglect to do so was a remissness in their duty, and a neglect of their legal obligations, as I have laid them down. If the defendants discharged their duty, within the rule I have submitted to you, your verdict must be for them. If they failed to do so, and if the injury to the plaintiff is fairly attributable to that failure, then your verdict must be for the plaintiff.

If you find for the plaintiff, you will assess the damages at such a sum as will, in your judgment, compensate him for the necessary expenses he has actually incurred in his sickness and cure, and in providing himself with artificial limbs;

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for the loss of time and income from his profession, during his illness; for the permanent injury inflicted upon him; and, so far as money can compensate him, for the pain he has suffered.

You will give the whole evidence a careful consideration, apply to it the rules of law, as I have laid them down, and return such a verdict as your judgment may dictate.

The jury returned a verdict for the plaintiff, for \$10,000.

AMELIA S. HODGE AND ZELIA C. HODGE, AS ADMINISTRAT-
TRIXES, &C., OF NEHEMLAH HODGE, DECEASED

v.s.

THE HUDSON RIVER RAILROAD COMPANY. IN EQUITY.

Where a license under a patent does not, on its face, cover the extended term of the patent, if it be claimed that, in fact, the parties to the license had in view at the time an arrangement covering such extended term, such fact must be shown by evidence.

The presumption of law in regard to every license under a patent is, that the parties deal in regard only to the term existing when the license is given, unless an express provision is inserted looking to a further interest; and, unless there be such a stipulation, showing that the parties contemplated an extension, the provisions of the license will be construed as relating to the then existing term only.

Where the validity of a patent is fully established, and its infringement is clear, the patentee has a right to protection by injunction, although great injury may thereby be caused to the infringer.

Where the question of the right to the injunction depends only on the interpretation to be given to a license, it is the duty of the Court to interpret the license, on a motion for the injunction, and to grant or refuse the injunction, according to the result of such interpretation.

It appearing that the defendant was willing to pay a reasonable sum for the use of the patented invention, and that the plaintiff had a fixed license fee for its use, and exercised the franchise solely by licensing, for fees, the use of the invention, the Court held, that the defendant ought to be enjoined only in case he should elect to be enjoined in preference to paying a reasonable license fee for the use of the invention, to such extent as he might desire to use it during the

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unexpired term of the patent; such fee to be no greater than the regular fee, if any, established in like cases, and to be ascertained as of the time of the filing of the bill, by a reference to a master, on testimony to be produced before him.

(Before BLATCHFORD, J., Southern District of New York, July 1st, 1868.)

THIS was a renewal of the motion for a provisional injunction, reported *ante p.* 85, and which was suspended to allow the plaintiffs to supply evidence on certain points.

Samuel D. Cozzens, for the plaintiffs.

Charles A. Rapallo, for the defendants.

BLATCHFORD, J. This motion is founded on letters patent, granted to Nehemiah Hodge, in his lifetime, October 2d, 1849, for an improvement "in the mode of operating brakes for cars," and reissued to him March 1st, 1853, and extended to him September 16th, 1863, for seven years from October 2d, 1863. In the opinion delivered by the Court, when this case was before it on a former occasion, it was stated, that the only question for consideration was, whether the defendants, by using the patented brake within this District, on their own railroad, on cars belonging to them, marked "New York, Sus. Bridge and Buffalo," and on cars belonging to them, known as "White Line" cars, and on cars belonging to them, known as "Blue Line" cars, and by using the patented brake within this District, on their own railroad, on sleeping cars and drawing-room cars, the brakes, trucks, and running gears of which cars belonged to them, had infringed the patent, as extended. The defendants justified their use of the brake under a license granted to them by the patentee, April 8th, 1862, before the extension, which, after reciting the granting and the reissue of the patent, and that "the Hudson River Railroad Company have used, and are desirous of continuing to use, the said improvement, upon their cars," goes on to say, that the patentee, for the consideration of six hundred and twenty-five dollars, paid to him by the company, authorizes

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and licenses them "to construct and use the said improvement on any and all cars belonging to said company, and to use the same improvement upon the entire length of their road, and upon all parts thereof, extending from the city of New York, in the State of New York, to the city of Troy, in said State, for and during the term for which said letters patent are or may be granted," and also, "to run or cause to be run their said cars, with said improvements, on and over other roads, on joint business, during the term above stated." The Court held, that the license covered all that had been shown to have been done by the defendants—that is, the use of the patented improvement on cars belonging to the company, on their own railroad, so far as the extent of their acts was concerned; that the license did not, by its terms, cover the extended term of the patent; that, therefore, the only right which the defendants possessed, under the extended term, was that which was given to them by the clause of the 18th section of the Act of July 4th, 1836, (5 *U. S. Stat. at Large*, 125,) which provides that the benefit of the extension of a patent shall "extend to assignees and grantees of the right to use the thing patented, to the extent of their respective interest therein"; that, as the thing patented in the present case was a machine, the law was entirely settled, that the only right which the defendants, as lawful licensees under the patent, for the first term, of the right to use the thing patented, acquired, under the extended term, by virtue of that clause in the 18th section, was the right to continue to use, until they should be worn out, or as long as they could be repaired, such brakes as they had lawfully in use under said license, on the 2d of October, 1863; that, as it was not shown in the papers whether the particular brakes used by the defendants since the 2d of October, 1863, on their own railroad, on the cars before-named, were or were not lawfully in use under said license on the 2d of October, 1863, it was impossible for the Court to decide whether the plaintiffs were or were not entitled to an injunction as respected those particular brakes; and that the motion must, therefore, be suspended, to allow the plaintiffs to supply evidence on that point.

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Since that opinion was delivered, the defendants have filed their answer in the suit. The only defence set up in the answer is, in substance, the license aforesaid, with the averment, on information and belief, that the patentee, at the time of executing and delivering to the defendants the license, informed them that he had applied for, or was about to apply for, an extension of the patent, and desired to sell to them the right to make and use the improvement, not only during the then unexpired term of the patent, but during the extension thereof which he represented he should obtain, that he demanded for such right the sum of six hundred and twenty-five dollars, that it was thereupon agreed between him and the defendants, that, upon the payment to him of that sum, he would sell and grant to the defendants such right, and that thereupon they paid him that sum, and he executed and delivered to them the license, claiming to and advising them that the same covered and contained the right to use and make the improvement for, and during, said unexpired term, and the said extension to be by him obtained. This averment is not sustained by the affidavit of a single witness who pretends to any knowledge of the facts covered by the averment. The averment is made in the answer on information and belief. The answer is sworn to by an officer of the company who had no connection with the company at the time the license was given, or with the giving of the license. The name of the person who furnishes the information is not disclosed. The facts set up are contradicted by the terms of the license. The license is witnessed by a member of the legal profession, who was at the time the secretary of and the counsel for the company, and it is shown on this motion that the patentee was also a lawyer. In view of all these facts, and of the settled presumption of law, in regard to every license under a patent, that the parties deal in regard only to the term existing when the license is given, unless an express provision is inserted, looking to a further interest, and of the further rule, that, unless there be such a stipulation showing that the parties contemplated an extension, the instrument,

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and each and all of its provisions, will be construed as relating to the then existing term only, there is no reason to suppose that the parties concerned in negotiating, drawing, executing, delivering, and accepting the license in question, had at all in view any arrangement covering any extended term of the patent. At all events, if any such defence is to be available as against the language of the instrument, it is for the defendants to maintain it by evidence, which they have wholly failed to do.

The new proofs now presented on the part of the plaintiffs show, that, since October, 1863, the defendants have put new infringing brakes upon new cars constructed by them since that date, and have run upon their road cars belonging to parties other than themselves, containing such brakes; and that other cars with such brakes have been built for the defendants since October, 1863, and run by them upon their road.

The counsel for the defendants has strenuously urged, on this renewal of the motion, the right of the defendants, under the license, to continue to use the patented invention, during the extended term, to the same extent as during the original term, and also its right to do so under the provision of the 18th section of the Act of 1836, and has insisted that such right extends not merely to brakes lawfully in use at the expiration of the first term, but also to new brakes constructed since the expiration of the first term. But I adhere to my views on this subject expressed in my opinion on the former motion.

The only other grounds urged against the granting of the injunction asked for, are, that the defendants are common carriers of persons and property; that they carry the mails of the United States; that their business is large and extensive, and is carried on by means of connections with other railroads; that any prolonged interruption of such business would do great and irreparable injury to them, and cause great detriment and inconvenience to the public; that it is necessary that the cars of the defendants should, for their proper and

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safe management, be supplied with such a double-acting brake as the infringing brake complained of in this case; that, to run passenger trains without such brakes, would be an act endangering the safety of passengers, and one of gross and criminal negligence; that the plaintiffs' patent covers all forms of double-acting brakes now in use or known to the public; that the defendants do not sell or make for sale any brakes, but only make them for use upon their cars; that the defendants are responsible to an amount far exceeding any possible recovery of the plaintiffs against them for the use of the brake; that the patentee, after the expiration of the original term of the patent, made no claim of infringement against the defendants; that the plaintiffs made no such claim until some time in 1867; that the defendants, in good faith, and confiding in their rights under the license, continued, after the expiration of the original term of the patent, to make, and attach to their cars, and use, the brake in question; that the plaintiffs have heretofore made known to the defendants, that their terms for a license for the use of the invention were not more than ten dollars per mile of the roadway; and that, after this Court announced its decision on the first hearing of this motion, the solicitor for the defendants repeatedly applied to the solicitor for the plaintiffs to know the terms upon which the plaintiffs would give to the defendants a license, but could not learn such terms, and was informed, in reply, that the plaintiffs intended to obtain an injunction against the defendants, but would not serve or use it unless compelled to do so.

In this case, the validity of the plaintiffs' patent has been fully established. There have been five trials by a jury, in suits brought on the patent, one in Maine in September, 1855, one in Rhode Island in November, 1856, one in Massachusetts in May, 1858, one in the Northern District of New York in June, 1859, and one in the same District in October, 1859. These trials all of them resulted in verdicts and judgments in favor of the patent. Three of them involved the novelty of the invention and the validity of the patent. Besides these

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recoveries, there have been four other judgments at law in favor of the patent, one by default, and three by confession after plea and notice of defence. So, too, the infringement in this case is clear. Under such circumstances, the rule, as established by this Court is, that a plaintiff has a right to protection by injunction, although great injury may thereby be caused to the infringer. (*Potter v. Fuller*, 2 *Fisher's Patent Cases*, 257.) In the case of *Sickels v. Mitchell*, (3 *Blatchf. C. C. R.*, 548,) where it was represented, on the part of the defendant, that the steamer on whose engine the patented improvement, a cut-off, was used, was one of a line, that her being laid up by an injunction would be a great public calamity, that it would be impossible to substitute another device without enormous expense and the consumption of several months of time, that the injunction would cause irreparable and unnecessary injury, and that the defendant was able to respond in any amount of damages which the plaintiff might recover for the use of the invention, this Court held, that those allegations were not sufficient to stop the issuing of the injunction, and said: "It is too much for a defendant, in a clear case, to insist upon having the privilege of using a patented invention, for the reason that he is able to pay the damages which may be awarded against him at the end of a protracted litigation to ascertain their amount. The plaintiff may not be as able to prosecute a suit as the defendant is to defend. And, if the evils which the defendant sets forth, are to follow by the granting of an injunction, he could easily have avoided them. The ground of complaint in the bill is, that the defendant is using the invention without paying a reasonable sum therefor. There would have been no cause of complaint if the defendant had paid a reasonable sum for the use of the invention. This he has not done, and he has refused to pay any thing unless compelled to pay by the judgment of a Court. The plaintiff has a right to demand of the defendant, if he wishes to use the invention, to first pay for such use. And, if he will not pay, and if the evils follow which he predicts, by his being compelled to desist, he has no one to

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blame but himself. As the case is now presented, the right of the plaintiff is clear, and the violation of right on the part of the defendant is equally clear." An injunction was ordered to issue in the case.

In the present case, the only defence of substance set up in the answer is the license, and, whether that is or is not a protection against an injunction, depends on the interpretation given to it. The plaintiffs' title to an injunction does not depend upon any controverted or doubtful facts, but upon the interpretation to be put by the Court upon the license. In such a case, it is the duty of the Court to interpret the instrument on the motion for the injunction, and to grant or refuse the injunction according to the result of such interpretation. (*Clum v. Brewer*, 2 *Curtis' C. C. R.*, 518, 519.) In regard to the construction to be put upon the license in this case, this Court has no doubt that such license does not cover the extended term of the patent.

In view of all the facts of this case, and of the settled practice in regard to injunctions, I should have no hesitation in granting the injunction asked for, but for one circumstance. It does not appear, as in *Sickels v. Mitchell* (before cited), that the defendants are unwilling to pay a reasonable sum for the use of the invention during the extended term. Where the right of the plaintiff is manifest, and the violation of right on the part of the defendant is clear, and the defendant refuses to make any compensation for such violation, this Court has held, (*Sickels v. Tileston*, 4 *Blatchf. C. C. R.*, 112,) that the consideration of either public or private convenience should have little weight. In this last case, the bill alleged that the defendant refused to pay the plaintiff for the use of the patented improvement, or to desist from using it. In *Sickels v. Mitchell*, the ground of complaint in the bill was not, that the defendant was using the invention, but that he was using it without paying a reasonable sum for its use. In the present case, the bill proceeds against, and seeks to enjoin, the use of the patented invention at all by the defendants. It does not aver or proceed on the idea that the defendants, if using the

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invention now without right, are unwilling to pay a reasonable sum for its future use. The defendants show that they must use the plaintiffs' brake, that they heard nothing of any claim of infringement from October, 1863, when the first term of the patent expired, until sometime in 1867, that they went on in good faith, during that time, to construct new brakes according to the patent, that the plaintiffs have a fixed license fee for the use of the invention, and exercise the franchise of the patent not by making or using the brake themselves, but solely by licensing others to make and use it for license fees, and that the defendants have, during the pendency of this motion, unsuccessfully endeavored to learn from the plaintiffs their terms for a license, in respect of the use of the patented invention complained of in this suit. In acting on applications for temporary injunctions to restrain the infringement of patents, there is much latitude of discretion, and the application may be granted or refused unconditionally, or terms may be imposed on either of the parties, as conditions for granting or refusing the injunction. (*Forbush v. Bradford*, 11 *Monthly Law Rep.*, 471.) I think this case is a proper one in which to impose such terms. The defendants ought not, under the circumstances, to be enjoined absolutely, but only in case they elect to be so enjoined in preference to paying a reasonable license fee for the use of the invention to such extent as they may desire to use it, during the portion of the extended term which remains unexpired, such fee to be no greater than the regular fee, if any, established by the patentee or the plaintiffs in like cases, and to be ascertained, as of the time when the bill in this suit was filed, by a reference to a Master, on testimony to be produced before him. The injunction asked for is to go absolutely, unless the defendants, within ten days after the confirmation of the Master's report, pay to the plaintiffs the fee reported, provided the plaintiffs, at the time of such payment, deliver to the defendants a license, duly executed, covering the use of the invention to such extent as the defendants may desire to use it, (the extent to be defined in the Master's report) during the portion of the

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extended term so remaining unexpired. In regard to the unauthorized use of the invention before the filing of the bill, the suit will in any event proceed.

THE UNITED STATES

vs.

7 BARRELS OF DISTILLED OIL, &c.

Where the owner of personal property, mortgaged by him to another person, remains in possession of it after giving the mortgage, and commits acts in respect to such property, which work a forfeiture of it to the United States, under the 25th section of the Internal Revenue Act of March 2d, 1867, (14 *U. S. Stat. at Large*, 483,) it must be condemned, even though the mortgagee is not shown to have been concerned in such acts.

Nor can the demand of the mortgagee be paid by the Court out of the proceeds of the property condemned.

The remedy of the mortgagee is, to apply to the Secretary of the Treasury for a remission of the forfeiture, as respects his demand.

(Before BENEDICT, J., Eastern District of New York, July, 1868.)

THIS was an information *in rem*, against certain crude oil and a still and apparatus for distilling such oil, alleged to have become forfeited to the United States, under the provisions of the 25th section of the Internal Revenue Act of March 2d, 1867, (14 *U. S. Stat. at Large*, 483.) The only claim interposed, was by one Clauson, who intervened as claimant, by virtue of a mortgage upon the property, executed to him by one Seeley, the owner. On the trial, it was conceded, that acts and frauds shown to have been committed by Seeley while in possession of the property, as the owner thereof, were sufficient to forfeit it as against him. It was also admitted, that the property had been conveyed by the claimant to Seeley, in good faith, prior to the commission of the acts complained of; that the claimant then, in good faith, took back a mortgage upon the property, as security for the pur-

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chase money; and that there was justly due on the mortgage the sum of \$2,400. It was further admitted, that the only interest of the claimant in the property, at the time of the commission of the acts entailing the forfeiture, was that derived from his mortgage; and that there was no evidence showing that the claimant had any knowledge of the frauds which were being committed by Seeley. On these facts the Court directed a verdict for the Government, condemning the property to be sold as forfeited to the United States, reserving the question, whether the fact that the claimant held a *bond fide* mortgage on the property, and was not shown to have committed any unlawful act, would preclude a decree condemning the whole property as forfeited.

BENEDICT, J. The question raised certainly presents a case of hardship, but it must be decided adversely to the claimant. By the 25th section of the Act of 1867, which is substantially a re-enactment of the 68th section of the Act of June 30th, 1864, (13 *U. S. Stat. at Large*, 248,) it is provided, that unlawful acts similar to those proved against the owner of this property, shall, when committed by the owner, agent, or superintendent of any still, boiler, or other vessel used in distillation, work a forfeiture of all the spirits made by or for him, and all the vessels used in making the same, and the stills, boilers, and other vessels used in distillation, and all materials fit for use in distillation, found on the premises. The provisions of the 25th section are, by the 94th section of the Act of June 30th, 1864, (13 *U. S. Stat. at Large*, 265,) made applicable to distilleries of coal oil, and are, therefore, applicable to the property in question, which consists of crude oil and a still, with the accompanying apparatus, used by Seeley, the owner, in the distillation of oil. If these provisions of law are to be taken to mean what they say, it cannot be doubted, that the only decree which can be rendered in this case is a decree which shall condemn this property to be sold as the absolute property of the United States, for, nowhere in the Act can any provision be found which,

by express terms, exempts from the effect of the decree any interest whatever in property condemned, whether acquired by mortgage or otherwise. The articles themselves and every part of them are made to become the property of the Government, by operation of law.

But, it is said that the forfeiture is intended to be a punishment for a criminal act, and that, therefore, only the property of the offender is to be considered as intended to be affected by the Act. No such intention, however, is disclosed. On the contrary, the statute expressly provides, that the act of the agent or the superintendent, without the knowledge of the owner of the still, shall forfeit it, thus clearly indicating a different intention. By the Act, the still itself is treated as the offender, and is seized and sold because of its guilty use. The forfeiture results from the mode of use, and is created to enable the Government to put an end to such use, by the apprehension of the thing used. This mode of enforcing obedience to revenue laws is common, and arises from necessity, by reason of the temptation to disregard laws of this class, and the difficulty of securing criminal conviction under them. The effect of such provisions is to make every person interested in any way in apparatus capable of being used to defraud the Government, responsible, to the extent of that interest, for the use of the apparatus, and, therefore, vigilant to aid the Government in preventing an unlawful use of it. But, if it be held that only the interest of the actual offender is affected, a door for fraud and collusion is open, which would go far indeed to nullify the Act. I find no such open door in the law. It is true that this construction of the statute will often work hardship; and the present may be an instance. It is to relieve such cases, while at the same time the efficiency of the law is maintained, that the power of remission is conferred on the Secretary of the Treasury. To that power alone this claimant can appeal.

I have not arrived at the conclusion above indicated without consulting, with great care, the views expressed by the learned Judge of the Eastern District of Missouri, in the case

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 In the Matter of Asa W. Craft, a Bankrupt.

of *United States v. 396 Barrels of Distilled Spirits*, (3 *Int. Rev. Record*, 114, 123,) where it was held, that the interest of a qualified owner, to the extent of his interest in the *res*, is to be protected by the Court, but where, as I also notice, the learned Judge remarks, that, if the *res* be in actual custody, a *venditioni exponas* will issue, and the lien demand will be paid out of the proceeds of the sale. How can this be? If only the interest of the offender be forfeited, how can any thing more than his interest be sold; or, if the Court decrees a forfeiture of the *res*, and sells it as forfeited to the Government, under what provision of law is it authorized to pay the proceeds of the sale to other parties than the Government? To exempt a certain portion of the proceeds of the sale of the property condemned from the effect of the condemnation, seems to me to be an exercise, by the Court, of a power which the law has conferred on the Secretary of the Treasury alone. With great deference, therefore, I feel obliged to differ with the Judge who decided that case, and must hold that, upon the finding of the jury in this case, a decree must be entered, condemning the whole property, as forfeited to the United States, and declaring that the claimant has no remedy in this Court for his demand.

In re ASA W. CRAFT, A BANKRUPT.

Where a petition in involuntary bankruptcy, filed under § 39 of the bankruptcy Act of 1867, (14 *U. S. Stat. at Large*, 536,) alleges the act complained of to have been done by the debtor "in contemplation of bankruptcy," and also states facts showing the debtor to have been insolvent at the time such act was done, and the evidence, on the trial, shows that the debtor was thus insolvent, but did not intend to take the benefit of the Act, and such evidence is not objected to, and there can be no surprise to the debtor in allowing the petition to be amended *nunc pro tunc*, by averring that the act was done by the debtor "while insolvent or in contemplation of insolvency," the Court may properly allow such amendment to be made.

The words "in contemplation of bankruptcy," in the Act, mean, in contemplation of committing what is made by the Act an act of bankruptcy.

In the Matter of Asa W. Craft, a Bankrupt.

A substantial amendment, *nunc pro tunc*, going to the whole foundation of a proceeding under the 39th section, cannot be allowed, as it would be a violation of the limitation prescribed by the section, as to the time within which the petition must be brought.

(Before NELSON, J., Southern District of New York, September 17th, 1868.)

THIS was a petition filed under the 2d section of the bankruptcy Act of 1867, (14 *U. S. Stat. at Large*, 518,) for the purpose of reviewing an order of the District Court, allowing, *nunc pro tunc*, an amendment of a petition in involuntary bankruptcy, filed by creditors, under the 39th section of that Act.

Edwin James, for the bankrupt.

Samuel Boardman, for the creditors.

NELSON, J. The petition in bankruptcy, as originally filed, stated, among other things, that Craft, the debtor, in contemplation of bankruptcy, gave to one Jones a confession of judgment, and caused a judgment to be entered thereon, upon which an execution was issued, &c.; and that this confession was entered into with intent to give a preference to Jones, one of his creditors, and to defeat the operation of the bankruptcy Act. The petition, also, stated facts showing that the debtor was insolvent. On the return of the order to show cause on the petition, the debtor denied the acts of bankruptcy set forth in the petition, and demanded a trial by the Court. The proofs show that Craft was insolvent when he gave the confession of judgment, and that, after the sale on execution under Jones' judgment, he had no property with which to pay his debts. It appears, however, distinctly, that the several acts of the debtor were not done or committed with intent to take the benefit of the bankruptcy Act, which was the averment relied on in the petition, as the foundation for proceeding against the debtor in bankruptcy.

The 39th section provides, among other things, that any person "who, being bankrupt or insolvent, or in contempla-

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tion of bankruptcy or insolvency, shall * * give any warrant to confess judgment, or procure or suffer his property to be taken on legal process, with intent to give a preference to one or more of his creditors, shall be deemed to have committed an act of bankruptcy." It will be observed, that the petition in this case did not aver that the debtor was insolvent or contemplated insolvency, but only that the several acts alleged were done in contemplation of bankruptcy. These latter words, in the bankruptcy Act of 1841, were construed to mean, in contemplation of committing what was made by the Act an act of bankruptcy. (*Buckingham v. McLean*, 13 *How.*, 150.) This construction would seem quite applicable to the same language in the present Act. The result is, as the proofs show, that the acts of Craft, in giving the confession of judgment to Jones, &c., were not in contemplation of bankruptcy, that the petition against him failed, unless it was competent for the Court below to grant the amendment in question, which was, to insert the words, "while insolvent or in contemplation of insolvency," in lieu of the words, "in contemplation of bankruptcy."

The only real objection to an amendment of a petition in bankruptcy, *nunc pro tunc*, is found in the clause of the 39th section of the Act which provides, that the petition shall be "brought within six months after the act of bankruptcy shall have been committed." To allow a substantial amendment, that is, one going to the whole foundation of the proceeding, *nunc pro tunc*, would be a direct violation of this limitation, which is obviously for the benefit of the debtor. But, in the present case, the amendment is little more than formal, as facts are alleged in this petition which, if true, (and the proofs substantiate them,) import that the debtor was insolvent at the time, and committed the acts alleged in contemplation of insolvency. Therefore, this new averment could not have taken the debtor by surprise, as it simply put in form what already appeared in substance, in the petition, and what must have been so understood by him on the trial of the issue before the Court, as no objection was taken to the evidence.

Order affirmed.

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CHARLES H. MEAD

vs.

THE NATIONAL BANK OF FAYETTEVILLE AND OTHERS.
IN EQUITY.

Where a creditor, to whom a debt was due by a copartnership composed of three persons, took, for a part of it, the note of the copartnership endorsed by one of the copartners, and, for other parts of it, severally, three notes, each made by one of the copartners, and endorsed by the two copartners other than its maker, and afterward the copartners were adjudged bankrupts, and the creditor proved his debts against the makers alone of the four notes: *Held*, that he was entitled to dividends, according to such proofs, out of the several estates, joint or separate, against which the proofs were made.

The copartners, in respect to the notes made or endorsed by them individually, were accommodation makers or endorers for the copartnership, which, as between the copartners, and in equity, was the principal debtor.

There is nothing in the 36th section of the Bankruptcy Act of March 2d, 1867, (14. *U. S. Stat. at Large*, 584,) which, in terms, prohibits such creditor from proving his debts, and taking dividends, against the joint and separate estates of his debtors, in virtue of their joint and several liabilities respectively, he being a legal creditor of the individual copartners in respect to the notes bearing their individual names either as makers or endorers.

It is the doctrine of the English Court of Chancery, that, in bankruptcy, a creditor who has knowingly taken both the copartnership and the individual obligation of his debtors for the same debt, must elect whether he will prove his debt against the joint estate or the separate estate of his debtors.

The English rule is, that the mere form of the security or evidence of indebtedness does not control in respect to the question whether the debt can be proved against the copartnership, or must be proved against the separate estate of a partner.

Whether the creditor in this case would, at his election, have a right to prove his whole debt against the copartnership estate alone, or would have a right to prove, upon the copartnership note, against the copartnership and the endorers on that note, and, upon the other notes, against the several makers and endorers thereof, *quere*.

The English rule of election, discussed.

Whether, in this case, the joint estate of the copartnership ought not to be deemed a debtor to the separate estates of the several copartners, to the extent of any

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payment to be made, on the debt due to the creditor, out of such separate estates, *quere*.

(Before HALL, J., Northern District of New York, September 21st, 1868.)

This was a final hearing on pleadings and proofs.

HALL, J. The defendants Edwin P. Russell, Porter Tremain, and Augustus Tremain, were adjudged bankrupts on the 6th of January, 1868; and the plaintiff was soon after appointed their assignee. These defendants had been copartners in business, and, on the 5th of December, 1866, were indebted to the other defendant, the bank, in the sum of \$43,000. This indebtedness was evidenced by sundry notes of the firm, as maker. Each of these notes of the firm bore the endorsement of one of the copartners, Porter Tremain being such endorser for \$13,500, Augustus Tremain for \$12,000, and Edwin P. Russell for \$17,500. On the day last-named, and for reasons not deemed necessary to be determined or discussed, the form of the paper which evidenced such indebtedness was changed, on the application of the officers of the bank; and the notes of the firm were taken for \$14,000, those of Porter Tremain for \$10,000, those of Augustus Tremain for \$9,000, and those of Edwin P. Russell for \$10,000. The notes made by the firm were endorsed by Edwin P. Russell, and those made by one of the individual partners, were respectively endorsed by the other two members of the firm. These notes were all given for the old previously-existing copartnership debt, and they were afterward renewed by like notes and like endorsements, all of the original and renewed notes and endorsements being in fact securities for debts which were the proper debts of the copartnership. In respect to the firm, whatever may have been the legal relations between the bank and the individual partners, (see *In re Babcock*, 3 *Story's Rep.*, 393, 398, 399,) these individual partners, in respect to the notes made or endorsed by them in their individual names, were accommodation makers or endorsers for the benefit of the firm; and

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the firm, as between the partners and in equity, must be considered as the principal and primary debtor. As between the bank and the individual partners, the making or endorsing of these notes created a legal obligation against the individual partner who thus made or endorsed such notes, and the bank might sue upon and enforce such obligation, according to its form and terms. It, therefore, had its election to sue either the maker or the endorser; and it might, if it chose, have maintained separate suits against the maker and each endorser, and taken a judgment against each. In short, the bank, when these notes were dishonored, was the legal creditor of the several parties thereto, according to their several and respective obligations; and there is no reason for holding that the legal relation of debtor and creditor, thus subsisting, did not exist under the bankruptcy Act. (*In re Babcock, ubi supra.*)

After the adjudication in bankruptcy, the bank, being then the holder and owner of the paper thus given in renewal, proved its debts as against the makers alone, that is, against the firm and joint estate, upon the firm-note for \$14,000, and against the individual members of the firm and their separate estates, upon the notes signed by each partner respectively; but it did not prove any demand against the separate estates of the copartners, upon such endorsements. There being assets in the hands of the plaintiff belonging to the joint estate of the bankrupts, as such copartners, and also assets belonging to the separate estates of the several individual members of the firm, and the relative amount of those assets being such that the bank would receive a much larger dividend, if allowed to take a dividend on its debt or debts as thus proved, partly against the firm, and partly against the partners individually, the plaintiff, as assignee, has filed his bill in this Court, and now insists, that the whole debt of the bank, being in equity and in fact the debt of the firm, must be proved as a debt against, and take a dividend from, only the joint estate of the bankrupts, and that no part of it can be paid out of the separate or individual estates of the bankrupts, in conse-

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quence of their individual liability either as makers or endorsers.

It is impossible for me, at this time, to give this case the careful examination and deliberate consideration which its importance deserves, without neglecting other cases having equal claims to an early decision. The counsel who argued the case were, as they said, unable to find any decision, under the Act of 1841, which determined this question; and my own limited research has brought under my observation but a single case, (that of *In re Farnum*, which will be hereafter noticed,) in which this question appears to have been decided.

The Act of 1867, (*sec. 36*), provides, "that, where, two or more persons who are partners in trade shall be adjudged bankrupt, either on the petition of such partners, or any one of them, or on the petition of any creditor of the partners, a warrant shall issue in the manner provided by this Act, upon which all the joint stock and property of the copartnership, and also all the separate estate of each of the partners, shall be taken, excepting such parts thereof as are hereinbefore excepted; and all the creditors of the company, and the separate creditors of each partner, shall be allowed to prove their respective debts; and the assignee shall be chosen by the creditors of the company, and shall also keep separate accounts of the joint stock and property of the copartnership, and of the separate estate of each member thereof; and, after deducting out of the whole amount received by such assignee, the whole of the expenses and disbursements, the net proceeds of the joint stock shall be appropriated to pay the creditors of the copartnership, and the net proceeds of the separate estate of each partner shall be appropriated to pay his separate creditors; and, if there shall be any balance of the separate estate of any partner, after the payment of his separate debts, such balance shall be added to the joint stock, for the payment of the joint creditors; and, if there shall be any balance of the joint stock, after payment of the joint debts, such balance shall be divided and appropriated to and among the separate

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estates of the several partners, according to their respective right and interest therein, and as it would have been if the partnership had been dissolved without any bankruptcy; and the sum so appropriated to the separate estate of each partner shall be applied to the payment of his separate debts." The same provisions, in substance, are contained in the Act of 1841, (*sec.* 14); and these provisions have been said to be in accordance with the rule as previously established. (See *In re Marwick*, before Judge Ware, 8 *Law Repr.*, 169; *Collins v. Hood*, 4 *McLean*, 186, 188; *In re Ingalls*, 5 *Law Repr.*, 401.)

These provisions of our statute do not, in terms, prohibit the bank, which had taken the precaution to require the note of the copartnership to be endorsed by the members of that copartnership, in their individual names, before giving credit upon it, from proving its debts and taking dividends against the joint and separate estates of these debtors, in virtue of those joint and several liabilities respectively; for the bank is clearly a legal creditor of the individual partners, in respect to the notes upon which their individual names appear, either as makers or endorsers. But the English Court of Chancery, (in the absence, it is said, of any statutory provision on the subject,) has, it seems, established the doctrine, that, in cases of bankruptcy, a creditor having knowingly taken the copartnership and the individual obligation of his debtors for the same debt, must elect whether he will prove his debt against the joint estate or the separate estate of his debtors. (*Collyer on Partnership*, *secs.* 940 to 948; *Avery & Hobbs' Bankrupt Law*, 308; 2 *Lindley's Law of Partnership*, 2d edition, *pp.* 1188 to 1195, and *vol.* 87 *Law Library*, *pp.* 1013 to 1025.) This doctrine of election necessarily concedes, that the creditor is a creditor of the firm and likewise of the separate partner whose individual liability he has taken the precaution to exact, and is, therefore, an authority sustaining the claim of the bank in this case, that it is the creditor of the individual partners upon the notes signed or endorsed by them individually.

The reasonable doctrine, that the mere form of the security

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or evidence of indebtedness does not control in respect to the question whether the debt can be proved against the copartnership or must be proved against the separate estate of a partner, seems, also, to be well established in England. (See cases referred to by *Avery & Hobbs*, pp. 309, 310, 311; and *Agawam Bank v. Morris*, 4 *Cushing*, 99.) Thus, where a firm borrowed money for partnership purposes, and only one of the partners gave a bond for its payment, the other being a witness to it, and the moneys being entered in the cash book of the firm, it was held, that the debt therefor might be proved as a joint debt. (*Ex parte Brown*, 1 *Atkyns*, 225; *Ex parte Emly*, 1 *Rose*, 61.)

In this case, it is probable that the bank would, at its election, have a right to prove its whole debt against the copartnership estate alone, if the rules established by the English Court of Chancery were to be adopted; but it is not necessary now to decide whether the bank has such right to prove against the joint estate, or whether it has a right to prove against the firm upon the firm-note, and against the endorsers thereon, and against the general makers and endorsers of the notes not signed in the firm-name, according to the legal liability of each, for the bank has not, as yet, insisted upon a right to prove its debts, except as against the makers of the several notes which evidence the indebtedness.

Looking to the questions actually presented in this case, I am of the opinion, that the bank had a right to prove its debts against the makers of the notes held by it, and is entitled to dividends from the joint and separate estates of the bankrupts, according to such proof. The utmost that can be claimed against the bank is, that it may be driven to its election; and, as it has proved its debts against the makers of the notes, and them alone, no valid objection has been urged against such proof.

It may, perhaps, be doubtful, whether the bank is compelled to elect, according to the English practice in bankruptcy. In the case of *In re Farnum*, (6 *Law Repr.*, 21,) already referred to, the learned Judge of the Massachusetts

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District held, that, under the bankruptcy Act of 1841, a creditor who presented a bill of exchange drawn by the firm and endorsed by one of the partners, was entitled to a dividend from the joint estate of the firm, and also a dividend from the separate estate of the partner who made such endorsement; and he repudiated the English rule, which required an election by the creditor under like circumstances. The question seems to have been carefully considered by Judge Sprague, and I confess I regard the rule he adopted as more reasonable than that of the English Courts; but, if I did not, I should be unwilling to disregard a decision, directly in point, made by that able judge, without very careful and deliberate consideration. The English rule has been disapproved by some of the most eminent judges and ablest lawyers of England; and Judge Sprague, in the case alluded to, declared, that the right of a party, holding two valid obligations, to the benefit of both, was founded both in law and justice, and that he did not think himself authorized to set aside that right, on account of an arbitrary rule, justly reprobated by the most eminent judges and jurists in England, and never recognized in this country. The English rule was condemned by Judge Story, (*Story on Partnership, sec. 376 et seq.*;) and, in *Borden v. Cuyler*, (10 *Cushing*, 476,) Judge Cushing, in delivering the opinion of the Court, declared, that it remained a mooted question in the United States, and that, in Massachusetts, the practice and the weight of professional opinion favored the double proof, but that the point had not then been adjudicated. It was not adjudicated in that case, nor has it been in any other case in our own Courts, that has fallen under my observation, except in the case of *In re Farnum*, already noticed; and, upon the authority of Judge Sprague's decision, and the best consideration I have been able to give to the questions presented, I am of the opinion that the bank had, at least, a right to prove its debts and claim dividends in the manner stated.

It is not, perhaps, necessary now to consider, whether the assignee, as the representative of the creditors of the individual partners, is not, in equity, entitled to require, that the

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joint estate shall be deemed a debtor to the assignee, as such representative, to the extent of any payments which may be made upon the debt of the bank out of the separate estates of the individual partners, in the same manner that any other party, who has made or endorsed similar notes for the accommodation of the firm, might be—and that, whether the English doctrine of election is, or is not, to prevail. The bill states, that the assets of the firm, though nominally amounting to about \$50,000, are really worth much less; that the individual assets of the partners, over and above incumbrances, are about as follows: Russell's, \$7,000; Porter Tremain's, \$11,000; and Augustus Tremain's, about \$3,000. The amount of the debts (other than those of the bank) proved against the firm, and against the several individual partners, is not stated, but the firm was insolvent and bankrupt, and it is alleged that Russell, individually, owed debts amounting to about \$900, while the other two partners owed no individual debts likely to be proved against their individual estates; but I see no statement of the firm or individual debts proved, either in the bill or in the testimony in the case, other than the debts held and proved by the bank. At all events, the question just suggested has not been argued, and a final disposition of it might require a settlement of the accounts of the individual partners with the firm; and, as the case decided by Judge Sprague, and the intimation made in 10 *Cushing*, were not called to the attention of the counsel, and were not discussed by them, I think it better not to make any decree in this case at present, but to advise the counsel that, in my opinion, the bank has a right to dividends against the joint and separate estates of the bankrupts, according to their proofs in the case, and that any other question in the case may be further argued. Further research by the counsel or myself may lead to the discovery of other cases decided under the Act of 1841, and bearing on the main question, but I am not able, at this time, to pursue the investigation. (See *Howe v. Lawrence*, 9 *Cushing*, 559, 560; *Somerset Potters' Works v. Minot*, 10 *Cushing*, 597; *Agawam Bank v. Morris*, 4 *Cushing*, 99; *Fuller v. Hooper*, 3 *Gray*, 334; *Tucker v. Oxley*, 5 *Cranch*, 34.)

The Heroine.

THE HEROINE.

In a collision case, where it appears that, at the time of the collision, the night was dark and rainy, with a high wind, and hazy, and the sea was running high, it should not be lightly presumed that the hands on board of a vessel would be remiss in their duty, and strong proof should be required to the contrary, in order to charge fault.

Where, in such a case, several of the material witnesses were examined orally before the District Court, and that Court found that the vessel which was under obligation to avoid the other vessel, could have discovered her lights in time to avoid her, this Court, although there was much evidence the other way, and the point was not free from doubt and difficulty, affirmed the decree. Fault imputed, because of the want of vigilance in a lookout.

(Before NELSON, J., Southern District of New York, October 1st, 1868.)

THIS was a libel *in rem*, filed in the District Court, by the owners of the brig Almore against the barque Heroine, to recover for the damages caused to the brig, by a collision which took place on the morning of the 21st of November, 1865, about 3½ o'clock A.M., some sixty or eighty miles southerly from Montauk Point, between the barque and the brig. The brig was bound on a voyage from Turks Island to Boston, with a cargo of salt. The barque, with a light cargo of hemp, and other goods, was going from Cronstadt, in Russia, to New York. The wind was east-northeast, and was free for the barque, which was heading about southwest by west. The brig was heading about southeast half south, and was close-hauled on her port tack. The brig was struck on her port bow by the starboard bow of the barque, her bowsprit was broken close to her bow, and was carried away, with rigging and sails, and fore topmast, and main topmast, and she sustained other injuries, so that her master and hands were compelled to abandon her as a derelict. The night was dark and rainy, with a high wind, and hazy, the sea was running high, and there was neither moon nor stars. Each vessel had a full complement of lights, placed, and burning, according to the

The Heroine.

Act of Congress. The District Court decreed for the libellants, and the claimants appealed to this Court.

J. C. Dodge (of Boston), and Adoniram J. Heath, for the libellants.

Benjamin R. Curtis (of Boston), and Edward D. McCarthy, for the claimants.

NELSON, J. It is not to be denied, that the brig was on the privileged course, and that it was the duty of the barque to give way, and pass her in safety. This point is not contested. The ground of defence set up, and, earnestly and ably discussed, is, that, in consequence of the character of the weather, it was impossible for the barque to discover the lights of the brig, after the greatest diligence, and with a competent lookout, in time to make the proper movement to avoid her, and that the collision was the result of inevitable accident. There is much evidence, in the record, tending strongly to support this view, and, at best, the opposing view, cannot be said to be free from doubts and difficulties; and, if the question were an original one before me, resting upon the proofs as exhibited in the record, I might hesitate to reach the conclusion of the learned judge below. The darkness of the night, and the storm of wind and rain, as detailed by witnesses, must necessarily have greatly tended to embarrass the discovery of the lights of the approaching vessel. In such a state of the weather, and with such difficulties of navigation, it should not be lightly presumed that the hands on board of a vessel thus exposed to dangers involving life and property, would be remiss in their duty, and strong proof should be required to the contrary, in order to charge fault. In such cases, however, the question must mainly be one of fact, and, as several of the material witnesses were examined orally before the learned judge, his opportunity for determining the degree of credit to which their testimony is entitled, was, of course, much better than mine is. He has arrived at the con-

The Corsica.

clusion that the barque could have discovered the lights of the other vessel, in the existing state of the weather, at least a quarter of a mile off, which would have afforded full time to execute the proper movement to avoid her. The weight of the proofs, as to the distance that the lights of a vessel might have been discovered at the time, is, perhaps, with this conclusion; and, in the relative position of the vessels, the starboarding of the barque a little earlier than it was done, would have enabled her to pass the other vessel clear. As it was, the bow only was struck.

What has influenced my mind in this case, more, perhaps, than any thing else, is the unsatisfactory account given of the lookout on the barque. Covered, as he was, with the main topsail, to protect himself from the storm, it is apparent that he was not in a condition, or free, to discharge the whole duty of a lookout. He was not, as he should have been, the first to discover the lights of the approaching vessel.

Upon the whole, I think that the decree should be affirmed.

THE CORSICA.

Where two vessels, under steam, were crossing, so as to involve risk of collision, and vessel No. 1, which had vessel No. 2 on her own starboard side, apprehending danger, stopped and backed, until she had stern-way on in the water, and vessel No. 2, instead of keeping her course, changed it, so as to make a collision inevitable, and one occurred: *Held*, that vessel No. 2 was in fault, for violating the provisions of Articles 14 and 18 of the Act of April 29th, 1864, (13 *U. S. Stat. at Large*, 58,) and that, under the circumstances, the change of course by vessel No. 2 did not come within any of the qualifications in Article 19 of the same Act.

(Before NELSON, J., Southern District of New York, October 2d, 1868.)

THIS was a libel *in rem*, filed in the District Court, by the owner of the steamer America, against the propeller Corsica, to recover for the damages caused to the America by a col-

The Corsica.

lision which occurred between the two vessels, in the harbor of New York, off the Battery, in the North River, near the Jersey shore, or about one-third of the way from it across the river, and opposite the Morris Canal basin, or the coal wharves near by, on the 9th of September, 1865. The District Court decreed for the libellant, and the claimants appealed to this Court.

Cornelius Van Santvoord, for the libellant.

Daniel D. Lord, for the claimants.

NELSON, J. The collision, in this case, took place at mid-day, in an open river, in clear weather, and between two vessels which were in plain sight of each other. The case has been ably and earnestly argued, as might well be expected, from the character of the counsel, and the amount of property concerned, and, especially, from the fact, that it involves, to a considerable degree, the intelligence and skill of those who were in charge of the navigation of the vessels. I have, therefore, studied the case with a care and attention corresponding with its magnitude, and the interests involved; and shall proceed to state, in a few words, the conclusions arrived at.

The Corsica was descending the river, (having come out of her dock, next below the Jersey City ferry, on her way out to sea,) some three hundred yards off the Jersey shore. The America had come from the East river, and, after she had rounded the Battery, and when she was about off Castle Garden, she shaped her course diagonally across the river, to reach her dock, at the foot of Sussex street, on the Jersey shore, heading, however, somewhat south of it, for the purpose of getting inside of the vessels which were usually anchored outside, or in front, and of then moving along the shore or docks, up to her berth. This was the relative position of the two vessels, when they were discovered by the hands on board of each other respectively. The America had reached the

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middle of the river, or thereabouts, when this discovery was made. There is some conflict, in the testimony, as to the exact distance the Corsica was up the river, above the America, at this time. She was still descending, on her track, already stated, along the Jersey shore. But the better opinion, I think, is, that she was some three or four times her length above the America. The America continued a short distance on her course, and then, apprehending danger in attempting to cross the bows of the Corsica, stopped, and backed, until she had stern-way on in the water, which, upon the evidence, would, beyond all doubt, have avoided a collision; but, unfortunately, about the same time, or a little later, the Corsica starboarded her helm, turning her course eastward, directly toward the America, and rendering a collision inevitable. Her starboard bow struck against the starboard side of the America, near her forward gangway, in an oblique direction, inflicting severe injury.

The proof is clear, that, if the Corsica had kept her course down the shore, no collision could have taken place; and, also, that there was room between her and the shore, for her to have ported her helm, and to have passed even further inward. The error of the pilot and master of the Corsica consisted in not observing the rule of navigation established by law. Article 14 provides: "If two ships under steam are crossing, so as to involve risk of collision, the ship which has the other on her own starboard side shall keep out of the way of the other." Under this rule, the burden of avoiding the collision rested upon the America; and she took the proper measures to discharge that duty. Article 18 provides, that where, by the above rules, one of two ships is to keep out of the way, the other shall keep her course, subject to the next Article (19), which provides, that, in obeying these rules, due regard shall be had to all dangers of navigation, and also to any special circumstances, which may exist in any particular case, rendering a departure from such rules necessary, in order to avoid immediate danger. The counsel for the Corsica has strongly urged, that that vessel, under the

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existing circumstances, comes within the qualification; and that her pilot or master had a right to assume that the America intended to cross his bows, in which event a collision would certainly have followed, if the Corsica had not starboarded her helm. I do not doubt, that the pilot and master acted honestly under this belief, when the order to starboard was given. But I cannot forget, and they should not have forgotten, that it was the duty of the America to give way, and that of their vessel to keep her course; and, as there was opportunity for the America to take measures in fulfilment of this duty, it was a fault in the pilot and master of the Corsica not to have acted on this view. It was the departure from the rule that embarrassed the America, and led to the disaster. Acting under this rule, and carrying out its injunction, the America had disabled herself from remedying the error committed by the Corsica. She had stopped her headway, and was lying helpless in the water. Inasmuch as the movements she adopted would have prevented the misfortune, to permit special circumstances in the case to modify them or render them inefficient, would be such an administration of the rules as would operate to entrap the responsible vessel.

Decree affirmed.

THE NEPTUNE.

Where oil, in casks, was transported, on freight, from Boston to New York, by a steam propeller, and some of the oil was lost on the voyage, and, in a suit *in rem*, by the owner of the oil, against the vessel, to recover for the loss, it appeared that the vessel encountered, on the voyage, an unusually violent storm, which fully accounted for the damage,¹ within an exception in the bill of lading: *Held*, That the onus was on the shipper, to establish carelessness or negligence on the part of the vessel, leading to the loss.

The main deck of a steam propeller, bulwarked entirely around and covered by the upper deck, and constructed specially for the purpose of carrying cargo,

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so that the cargo placed there is as completely protected from the weather and from storms as if it were in the hold, is a proper place in which to stow such cargo.

(Before NELSON, J., Southern District of New York, October*2d, 1868.)

THIS was a libel *in rem*, filed in the District Court, against the steam propeller Neptune, by the owners of a quantity of oil in casks, shipped by that vessel, on freight, from Boston to New York, on the 29th of November, 1865, to recover for the loss of some of the oil. The District Court dismissed the libel, and the libellants appealed to this Court.

George T. Curtis, for the libellants.

Erastus C. Benedict, for the claimants.

NELSON, J. The casks of oil, in this case, were of various sizes, containing from eighty to three hundred gallons each. The propeller encountered, on the voyage, an unusually violent storm, which fully accounts for the damage within the exception in the bill of lading, and throws the onus on the shippers, to establish carelessness or negligence on the part of the master or owners of the vessel, leading to the particular loss. This they have attempted to do, by charging, first, that the casks were badly stowed, and, secondly, that they were stowed between decks; when they should have been stowed in the hold.

As appears from the proofs, a large portion of the hold of such a propeller as this one was, is used for her engines, water, boilers, coal, &c., although there is some space left for freight; but much the greater part of the freight is carried between decks, or on the main deck, as it is called. This deck is constructed specially for the purpose of carrying freight. It is bulwarked entirely around, and covered by the upper deck, and is as completely protected from the weather and from storms, as if it were the hold; and freight can be stowed in it as securely as in the hold. It may, perhaps, require more care in the stowage of casks, and of packages of that

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description, to prevent their rolling in stormy weather, than if they were in the hold, the tendency to disturb the cargo upon this deck being greater than when it is below. I concur, therefore, with the Court below, that no fault is chargeable to the vessel, in stowing the oil in the between decks.

There is much conflict of evidence in the case, on the subject of the proper stowage of the casks—much more than should be expected from the intelligent shipmasters, and other experts, who have been examined; but, in this conflict, I am not disposed to overrule the conclusion of the learned judge below, who has examined the case with great care and attention on both of the points to which I have referred.

Decree affirmed.

ELI W. BLAKE vs. CHARLES W. STAFFORD.

The reissued patent granted to Eli W. Blake, January 9th, 1866, for an "improvement in machinery for breaking stones," on the surrender of original letters patent granted to him, as inventor, June 15th, 1858, is valid.

The legal status of reissued patents in their relation to the originals, and of questions of fraud growing out of imputed motives for obtaining reissues, and out of alleged corrupt or deceitful practices by inventors or owners of patents, in availing themselves of the privilege of surrender and reissue, considered.

The decision of the Commissioner of Patents, in accepting a surrender and granting a reissue, is final and conclusive, unless fraud or collusion is shown, or some irregularity is apparent on the face of the papers, or there is a plain repugnance between the specifications of the original and reissued patents.

The issue of fraud can be raised only by distinct and special allegations in the plea or answer.

What allegations, in a notice under the general issue, are insufficient to raise a question of fraud, considered.

The questions of infringement and novelty, in this case, considered and determined.

(Before NELSON and SHIPMAN, JJ., Connecticut, October 8th, 1868.)

THIS was an action at law, for the infringement of reissued letters patent granted to the plaintiff, January 9th, 1866, for an "improvement in machinery for breaking stones," on the surrender of original letters patent, granted to him as inventor, June 15th, 1858. The action was tried before the Court, (SHIPMAN, J.,) without a jury.

SHIPMAN, J. The specification of the original patent granted to the plaintiff, gave the following general description of the mechanism of his machine: "My stone-breaker, so far as respects its principle, or its essential characteristics, consists of a pair of jaws, one fixed and the other movable, between which the stones are to be broken, having their acting faces nearly in an upright position, and converging downward, one toward the other, in such manner that, while the space at the top is such as to receive the stones that are to be broken, that at the bottom is only sufficient to allow the fragments to pass when broken to the required size, and giving to the movable jaw a short and powerful vibration through a small space, say one-fourth of an inch, more or less. By means of this form and arrangement of the jaws, and this motion of the movable jaw, when a stone is dropped into the space between them, it falls down until its farther descent is arrested between their convergent faces, the movable jaw, advancing, crushes it, then, receding, liberates the fragments, and they again descend, and, if too large, are again crushed, and so on until all the fragments, having been sufficiently reduced, have passed out through the narrow space at the bottom. The details of the structure of the machine, other than those already specified, relating to the manner of supporting the jaws in their proper relative position, and giving motion with the required power to the movable jaw, may be varied indefinitely, without affecting its principle of operation." The inventor then proceeded to give a detailed description of all the parts of the machine, and concluded with the following claim: "What I claim as my invention in the herein described machine, and desire to secure by letters patent, is the combination of the fol-

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lowing features in the construction, arrangement, and movement of the jaws, to wit: 1. Making the acting faces of the jaws upright, or so nearly so that stones will descend by their own gravity between them; 2. Making the acting faces of the jaws convergent, in such manner that, while the space between them at the top is sufficient to receive the stones that are to be broken, that at the bottom shall be only sufficient to allow the fragments to pass when broken to the required size; 3. Giving a short, vibratory movement to the movable jaw. I disclaim the above three features severally, and limit my claim to their joint coöperation, as herein described, in a machine for breaking stones or other hard substances."

In the specification of the reissued patent, the general description above cited from the original, is enlarged, by introducing the words, "and of a revolving shaft driven by steam or other power, which is made to impart to one of these jaws a continual vibratory movement," &c. There are some other unimportant verbal changes in this part of the description. The claim of the reissue is as follows: "1. The combination, in a stone-breaking machine, of the upright convergent jaws, with a revolving shaft and mechanism, for imparting a definite reciprocating movement to one of the jaws from the revolving shaft, the whole being and operating substantially as set forth; 2. The combination, in a stone-breaking machine, of the upright movable jaw with the revolving shaft and fly-wheel, the whole being and operating substantially as set forth; 3. In combination with the upright converging jaws and revolving shaft, imparting a definitely limited vibration to the movable jaw, so arranging the jaws that they can be set at different distances from each other at the bottom, so as to produce fragments of any desired size."

The material difference between the specification of the original and that of the reissue consists in introducing into the general description in the latter the revolving shaft; and in an entire reconstruction of the claim. The specification and claim of the reissue are referred to in the notice filed

under the general issue, in two places, and in different forms of allegation. The good faith of the plaintiff in surrendering the original and obtaining the reissue, and the identity of the two, were questioned on the argument. As the questions attempted to be raised in this part of the case are so often mooted in suits of this character, I deem it proper to recall attention to the legal status of reissued patents in their relation to the originals, and of questions of fraud growing out of imputed motives for obtaining reissues, as well as out of alleged corrupt or deceitful practices by inventors or owners of patents, in availing themselves of the privilege conferred by the surrender and reissue clause of the Act of Congress.

The 13th section of the Act of July 4th, 1836, (5 *U. S. Stat. at Large*, 122,) provides, that when a patent "shall be inoperative or invalid by reason of a defective or insufficient description or specification, or by reason of the patentee claiming, in his specification, as his own invention, more than he had or shall have a right to claim as new, if the error has or shall have arisen by inadvertency, accident, or mistake, and without any fraudulent or deceptive intention, it shall be lawful for the Commissioner, upon the surrender to him of such patent, and the payment of the further duty of fifteen dollars, to cause a new patent to be issued to the said inventor for the same invention, * * * * in accordance with the patentee's corrected description and specification." Under this section, patents are constantly being surrendered and reissued; and it is not to be denied that the practice is frequently attended with embarrassment to the Courts and the public. Inventors are not usually sufficiently skilled in the art of nice composition, to enable them to accurately draft their own specifications. They must, therefore, resort to others; and it not unfrequently happens that the draftsman employed to describe a particular invention, either through want of skill, or from haste or ignorance of the state of the art, gives, in the specification, a very imperfect description of the thing invented. He sometimes narrows the scope of the inventor's ideas and combinations, and at other times expands them over

instruments and devices which are not the product of his original thoughts. He may fail to set forth some feature of the invention which at the time is deemed unimportant, and which subsequently may be proved to be vital, or at least of great value. If the invention is of considerable pecuniary consideration, the public examine it with scrutinizing eyes, and, if an inch of ground within the true scope of the discovery is unoccupied by the specification, it is at once seized upon by parties to whose business the new improvement has a near relation. If a fatal or damaging error has crept into the description, that fact is soon ascertained by those who desire to avail themselves of whatever improvement has been discovered. The privilege of surrender and reissue is, therefore, invaluable to inventors, for without it they would often lose that protection for the offspring of their skill and labor which it is the immediate object of all patent laws to afford. It is, indeed, to be regretted that so great a proportion of the industry and intellectual acumen expended upon patents should be devoted to assailing, circumventing or defeating them, rather than to their original construction. But the greatest skill and most untiring patience would not always be able to guard against all error. The privilege of surrender and reissue is, therefore, necessary for the protection of inventors, and the Act of Congress has explicitly stated the cases to which it shall extend, and conferred upon the Commissioner the power of determining when a patentee has brought himself within its provisions. As the law now stands, I regard the decision of the Commissioner as final and conclusive, unless impeached for fraud in his or the patentee's acts, or for some irregularity arising on the face of the papers, or for a clear repugnance between the original and reissued patents. Under the Act, the Commissioner has the power to decide, and, in every acceptance of a surrender and every reissue, does decide, that the original patent was inoperative and invalid by reason of a defective specification or by claiming too much, and that the error arose by inadvertency, accident, or mistake, and without any fraudulent or deceptive

intention. He is authorized to grant a new patent for the same invention and for no other, and, when he grants the new one, the presumption is that it embraces the same invention as the original. The jurisdiction of the Commissioner is final and conclusive, unless, as already stated, fraud or collusion somewhere is proved, or some irregularity is apparent on the face of the papers, or there is a plain repugnance between the old and new specifications.

The issue of fraud can be raised only by distinct and special allegations in the plea or answer. (*Woodworth v. Stone*, 3 *Story*, 749, 753; *Allen v. Blunt*, 3 *Story*, 742, 743; *Potter v. Holland*, 1 *Fisher's Pat. Cases*, 382, 388, 389, and 4 *Blatchf. C. C. R.*, 238; *Railroad Co. v. Stimpson*, 14 *Pet.* 448; *Stimpson v. Railroad Co.*, 4 *How.* 380.) Now, the allegations in the notice under the general issue in this case, raise no question of fraud. The averments, that the specification of the reissue "is vague, ambiguous, and uncertain, does not, in a full, clear, and exact manner, or with sufficient certainty, describe the invention of the said Blake, or the manner of making the machine mentioned in his declaration, * * * that it contains more than is necessary to produce the desired result, * * * that the claim for a mode of breaking stone is frivolous, * * * and that, for divers other reasons, the patent is void," do not raise any question of fact, except the one whether the construction of the machine is sufficiently described to enable one skilled in the art to make it. Nor does the allegation that the "claim is fraudulently and falsely made broader and more general and comprehensive than his invention," properly present any material question of fact. The office of the claim is to define the limits of the patented discovery claimed by the patentee as his exclusive property. The language of this part of the instrument need not, unless the peculiar nature of the subject-matter requires it, be expressed with technical exactness. If, by the use of good sense, and the ordinary rules of interpretation, the Court can clearly see the nature and limits of the invention, the claim will be upheld. If it is so ambiguous and uncertain that its

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true meaning cannot be made out without resorting to conjecture, or if it includes that which is old, and, therefore, not within the power of the patentee rightfully to claim, then the patent is void. (*Lowell v. Lewis*, 1 *Mason*, 182; *Barrett v. Hall*, 1 *Mason*, 447; *Moody v. Fiske*, 2 *Mason*, 112.) Whether it is vague and uncertain is a question of law, to be determined by the rules of construction, applied in the light of the state of the art. Whether it claims too much is a question of law, to be determined in the same way. The element of fraud is not essential to the determination of either of these questions by the Courts. The good faith of the patentee is a material question for the Commissioner, when deciding on the surrender and the reissue. But, where the patent is brought to the test of a litigation, ambiguity or excess in the specification and claim is to be determined by construction, and the instrument must stand or fall under this test. Ambiguity which defies construction to elucidate, is fatal; and it is unimportant whether it had its origin in the *mala fides* of the patentee, or in the haste or incompetency of the draftsman. A claim which clearly embraces what is old is void, whether introduced purposely or by mistake. The fact that the patent is ambiguous, or claims too much, is the vital test of its validity, and not the motive or circumstance in which such ambiguity or excessive claim originated. It might be said that, if a fraudulent intent to make the specification or claim obscure, were proved by extrinsic evidence, the Court ought not to give the patentee the benefit of the liberal rule of construction which prevails in favor of inventors. But this rule of construction rests upon public policy, and not upon cases of individual merit. Its application to the instrument is necessary before it can be determined whether or not the alleged defect exists. To withhold its application would be to punish before the *corpus delicti* is proved.

It follows, from these views, that there is no question of fraud in fact presented in this case, which is cognizable by the Court. The propriety and validity of the reissue are not open questions, in the present state of the pleadings, unless

presented on the face of the papers. No irregularity is discovered in the written proceedings connected with the surrender and reissue; and, after a close and careful comparison of the original and new specifications, I find no such repugnance between them as would warrant me in saying that the Commissioner has exceeded his jurisdiction by reissuing the patent for a different invention from that embraced in the original. The specification of the reissue differs, of course, from that of the original. The object of the surrender was to modify the description, or claim, or both. It may be, as the defendant insists, that the ground covered by the reissue is enlarged beyond that embraced in the original. But the true question is, whether it is broader than the original invention. The first branch of the claim is, for "the combination, in a stone-breaking machine, of the upright convergent jaws, with a revolving shaft and mechanism, for imparting a definite reciprocating movement to one of the jaws from the revolving shaft, the whole being and operating substantially as set forth." The second branch claims a subordinate combination of the movable jaw with the revolving shaft and fly-wheel. The first part of the third branch of the claim purports to be for a combination, but the whole sentence shows nothing more than the arrangement of the jaws and their adjustability, so that they can be set at different distances from each other at the bottom, in order to fix the size of the fragments to which the stones are to be reduced. The whole claim, when read in the light of the specification and drawings, discloses plainly the organized mechanism which the inventor has patented. It consists of two strong upright, or nearly upright, convergent jaws, fixed in a suitable frame, one of the jaws being stationary and the other movable, the movable jaw being connected with a revolving shaft and mechanism, whereby, when the motive power is applied, a definite reciprocating and vibratory movement is imparted to the movable jaw, by which it alternately advances and recedes from the fixed jaw, crushing the stones as it advances and liberating them as it recedes, so that they drop out from between the bottom of the jaws, of

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a size substantially determined by the distance by which they are separated when the movable jaw is drawn back. This distance, and consequently the size of the fragments, may be varied, by adjusting the machine as described in the specification.

The only difference that I can discover between the mechanical construction of the vital part of this machine and of that of the defendant is, that every part of the movable jaw of the latter advances and recedes through an equal range of motion, while, in the plaintiff's, the movable jaw is so hung and operated that the range through which it moves is greater at some points than at others. In both, the whole body of the movable jaw advances towards and recedes from the fixed jaw at every throw of the machine. By this advancing and receding motion, the stones are alternately crushed and liberated. The intervening mechanisms, by or through which the motive power is imparted, are well-known mechanical equivalents, and the common property of the mechanical world. But the combination of these upright convergent jaws, so constructed and adjusted, with a revolving shaft, by which this action of the movable jaw is produced, appears, upon the proofs before me, to have originated with this plaintiff; and, as already stated, the only difference, in this part of the mechanism, between his machine and that of the defendant is, that the movable jaw of the former is both vibratory and reciprocating, and that of the latter reciprocating only, giving an equal range of motion to every part. It may be, that the simple motion of the defendant's jaw is preferable to the combined motion of the plaintiff's. But, assuming that to be the case, it is only an improvement on the latter. This improvement can give the defendant no right to use what the plaintiff first discovered. In my judgment, therefore, the machine of the defendant infringes on the grant secured to the plaintiff by his patent.

I have carefully examined the various patents, drawings, and models of other machines offered in evidence, to antedate the plaintiff's invention, but I do not find the same com-

bination and arrangement of parts, nor the same mode of operation. I will here notice some of them.

The ice-breaker exhibited on the trial has a stationary and a movable jaw, but the latter is not hung, nor does it operate, in the way that the plaintiff's does. It is pivoted at a different point, and, as it moves forward, has, also, a downward motion. It is provided with sharp teeth, for penetrating and splitting the ice. Neither the whole machine, nor the movable jaw, is combined with a revolving shaft. Its arrangement and organization differ widely from the plaintiff's, and could not perform the work of breaking stone, as does the latter.

The iron squeezer, or alligator jaws, for compressing puddle balls and expelling their impurities, is still more unlike the plaintiff's machine. It operates like a lemon squeezer reversed, and gradually compresses the material partially softened by heat. It has none of that sudden, definite movement found in the plaintiff's machine, which may be termed a compound of pressure and blow, by which hard, brittle stones may be nipped and crushed to a particular size.

In Ohnmacht's coal breaker, the two portions which are said to resemble the jaws in the plaintiff's stone breaker are clearly different, and perform their work in a different way. One is perforated with holes, and, on the other, opposite the holes, are sharp teeth, which split the coal and force it through the opposite apertures. The coal is not reduced to fragments by compression between two solid surfaces, as in the stone breaker, but by teeth projecting from one surface driven against the pieces as they pass over the open spaces of the opposite surface. It certainly has not been proved, and it may well be doubted whether it could be proved, that this coal breaker, however massive and strong its organization, can perform successfully the work which the plaintiff's stone breaker performs, and performs well.

Poor's coal breaker has still less resemblance to the plaintiff's machine.

Hamilton's quartz crusher operates upon a different principle from the machine of the plaintiff. The work is done by

a cylinder rotating on a central axis, within an eccentric stationary concave. As the cylinder oscillates, the stones in its grooves are carried around and pressed in between the cylinder and the internal surface of the approaching concave, and ground or crushed. The oscillating cylinder, which alone can perform any function similar to the plaintiff's movable jaw, has no vibratory or reciprocating motion carrying it towards a fixed object. Its oscillations describe the segment of a perfect circle. Its surface comes near, or recedes from, that of the concave, solely by reason of the eccentric sweep of the latter. It is hardly necessary for me to say that I do not find the organized mechanism described in the plaintiff's patent, in this machine of Hamilton's.

Considerable was said on the argument touching the fact that some or all of the elements included in the plaintiff's combination are old. But this is not material. The question is not whether the elements are new, but whether the combination is new. Though the separate parts are all as old as the art of the mechanic, if they are organized into a new machine, having a new mechanical operation, and the organization of this new machine involved the exercise of original thought and is productive of useful results, then it is patentable. If no inventive skill, but only mechanical dexterity, was necessary to produce it, then it is not patentable. Originality is the test of invention. If that is successfully exercised, its product is protected; and it is immaterial whether it is displayed in greater or less degree, or whether the new idea revealed itself to the inventor by a sudden flash of thought, or slowly dawned on his mind after groping his way through many and dubious experiments. It is needless to remark, that originality may be found as well in new combinations of old elements as in the production of new ones. I think the plaintiff's machine embodies a new combination. The utility of the invention is clearly proved.

No specific damages are proved, and they are, therefore, assessed at the nominal sum of one dollar. Let a judgment for the plaintiff for that sum be entered, with costs.

Subsequently, a motion for a new trial was made by the defendant, before the Court when held by NELSON and SHIPMAN, JJ.

NELSON, J. The amendment made on the surrender of the patent consisted in remodelling the claim. The descriptions and drawings are not only substantially but almost literally the same. The first amended claim embraces the first two original claims, and corrects the third original claim, which was imperfectly set forth in the first patent. The third original claim was a claim for giving a short vibratory movement, in the abstract. The second and third amended claims are well warranted from the description in the patent.

The only real question in the case arises out of the defence of want of novelty in the improvement. It has been strongly argued, that it is found substantially in one or more machines already in use—the ice breaker, or the coal breaker, or Hamilton's quartz crusher. Judge Shipman, before whom the case was tried without a jury, and who had an opportunity to examine the experts, and, also, these several machines, in connection with the testimony of the experts, came to the conclusion that the machine of the plaintiff was substantially different in combination and arrangement, and also in its mode of operation. My examination of these machines has led me to the same conclusion. Hamilton's quartz crusher embodies neither the arrangement nor the mode of operation of the plaintiff's machine, but operates on a different principle, embodying a different set of ideas ; and that, I believe, is the only one produced which was intended to crush stone. The patent of the plaintiff has been before Vice Chancellor Wood, in England, on a petition for an injunction to protect it from infringement. The novelty of the machine was disputed, but the patent was sustained, and an injunction was granted.

On the whole, we are satisfied with the finding of the Court, and must deny the motion for a new trial.

The Farragut.

THE FARRAGUT.

A steam tug, employed in towing, on the Connecticut River, between its mouth and the city of Hartford, and exclusively within the limits of the State of Connecticut, vessels engaged in commerce among the several States, such tug not being itself engaged otherwise in commerce, is not within the provisions of the 4th section of the Act of June 8th, 1864, (13 *U. S. Stat. at Large*, 120,) in regard to inspection.

(Before NELSON, J., Connecticut, October 8th, 1868.)

THIS was a libel of information, filed in the District Court, in Admiralty, by the United States, against the steam tug Farragut, claiming a forfeiture of the vessel, for the reason that she was employed in towing vessels engaged in commerce among the several States, from the mouth of the Connecticut River, to the city of Hartford, without having the license required by the Act of June 8th, 1864, (13 *U. S. Stat. at Large*, 120.) The District Court dismissed the libel, and the United States appealed to this Court.

NELSON, J. The tug is employed in towing vessels on the Connecticut River, between its mouth and the city of Hartford, exclusively within the limits of the State of Connecticut, and is not itself engaged otherwise in commerce. The 4th section of the Act of June 8th, 1864, (13 *U. S. Stat. at Large*, 120,) declares, that the 42d section of the Act of August 30th, 1852, (10 *Id.*, 75,) shall be so construed as to require the inspection, in the manner prescribed by the latter Act, of every vessel propelled, in whole or in part, by steam, and engaged as a ferry-boat, tug or towing boat, or canal boat, in all cases where, under the laws of the United States, such vessels may be engaged in the commerce with foreign nations, or among the several States. The argument on the part of the Government is, that, by vessels engaged in the commerce with foreign nations, or among the several States, is meant vessels towed; and that, if they are engaged in such

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commerce, the tug engaged in moving them is also. But this is a very broad construction, and is not borne out by the language of the section. The language is—every vessel propelled, &c., and engaged as a ferry-boat, tug or towing boat, &c. Where, under the laws of the United States, such vessels are engaged in commerce, &c., they are required to be inspected and to take out the license. It is the ferry-boat, or the tug itself, that must be engaged in commerce under the laws, &c., in order to subject it to the penalties of the Act. Within this explanation, the libel cannot be sustained. It would have been easy and natural to have said—every tug employed in towing vessels, which vessels are engaged in commerce, &c.—if the construction contended for had been intended.

Decree affirmed.

THE CHARTER OAK FIRE INSURANCE COMPANY

v.s.

THE STAR INSURANCE COMPANY. IN EQUITY.

Where a suit at law was brought, in a State Court, on a policy of re-insurance, and, while it was pending, the plaintiff brought a suit in Equity, in the same Court, against the defendant, to reform the policy, for mistake, and to prohibit the defendant from setting up, in defence, certain specified matters, and the defendant removed the suit in Equity into this Court, under the 12th section of the Act of September 24th, 1789, (1 *U. S. Stat. at Large*, 79): *Held*, that the suit in Equity was an original suit, and was properly removable under said section.

(Before NELSON and SHEPMAN, JJ., Connecticut, October 8th, 1868.)

THIS was a suit in equity, commenced in the Superior Court of Connecticut, for Hartford county, and removed into this Court by the defendants, under the 12th section of the

The Charter Oak Fire Insurance Company v. The Star Insurance Company.

Judiciary Act of September 24th, 1789, (1 *U. S. Stat. at Large*, 79.) The plaintiffs now moved to remand the suit to the State Court.

NELSON, J. The plaintiffs brought a suit at law, in the Superior Court of Connecticut, for Hartford county, against the defendants, a corporation created under the laws of New York, its place of business being at Ogdensburg, St. Lawrence county, New York, on a policy of re-insurance. The defendants appeared, and, on the trial, moved for a nonsuit, which, according to the practice, reserved the question for the advice of the Supreme Court of Errors. Pending this case, the same plaintiffs filed a bill before the same Court sitting in chancery, to reform and correct the policy of re-insurance, claiming certain mistakes in it, and praying that the contract might be reformed, and the defendants be prohibited from setting up, in defence, certain specified matters. On the appearance of the defendants to this suit, the proper steps were taken by them to remove the cause to this Court, they being non-residents, and coming within the 12th section of the Judiciary Act. The plaintiffs, with a view to obtain a decision of this Court, as to the legality of this proceeding, have made this motion to remand the cause.

It is understood that the State Court refused the application for the removal, on the ground that the case did not come within the Act of Congress. The argument is, that this suit is ancillary to, or in aid of, the suit at law, and is not an original suit, in the sense of the 12th section, but is supplemental to, and dependent on, the suit at law, pending in the same Court, the Court possessing jurisdiction both at law and in equity. We think this a mistaken view of the case. The remedy sought by this bill is founded on a familiar rule of equity jurisdiction, namely, accident and mistake, and which is the appropriate subject of an original bill in equity; and the fact that it is intended to aid a Court of law, or to prevent a party from availing himself of an inequitable suit or defence in a Court of law, in some other

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action, does not deprive the bill of its character as an original bill. Bills of a kindred character, such as bills for removing impediments to a trial at law, or advantages gained by fraud, and the like, bills of discovery, creditors' bills, &c., all in aid of suits at law, are the constant subjects of original jurisdiction in equity. If this bill had been brought in the Superior Court before the suit at law, and which it might have been, and, indeed, most fitly should have been, there could have been no doubt as to the character of the bill; and the circumstance that the plaintiffs chose to bring their suit at law first, can hardly be said to change such character. The jurisdiction of the Court cannot depend upon the mere will, or choice, of a plaintiff, as to which suit he will commence first.

We perceive no difficulties in the execution of any decree that may be rendered in this Court. If the contract shall be reformed, it will be competent evidence before the Court of law, the reform will be as effective as if it had been decreed in the Superior Court, and the defendants will be as subject to the control of this jurisdiction as of that.

Upon the whole, we are of opinion that the cause has been properly removed.

THE WESTERN METROPOLIS.

Where it is the duty of a steamer to avoid a sailing vessel, the onus is on the steamer to show, in case of a collision, that the sailing vessel did not keep her course, or to show some other fault on the part of the sailing vessel, that contributed to the collision.

Where the change of course by the sailing vessel is made under impending danger and *in extremis*, the steamer is responsible for it.

The duty of a steamer, at night, not to approach too near to a sailing vessel, in meeting her, when there is room to give her a wide berth, enforced.

(Before NELSON, J., Southern District of New York, October 9th, 1868.)

THIS was a libel *in rem*, filed in the District Court, by the

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owners of the schooner *Mary C. Town*, against the steamer *Western Metropolis*, to recover for the damages sustained by the schooner, in a collision which happened between the two vessels, about eight o'clock P. M., on the 10th of February, 1864, on the Potomac river, a few miles above Blackstone's Island and light-house. The District Court dismissed the libel, and the libellants appealed to this Court.

Dennis McMahon, for the libellants.

Charles Donohue, for the claimants.

NELSON, J. The steamer was coming up the river. The schooner was going down, with the wind northerly, so that she had it nearly full, and was moving at the rate of about eight knots an hour. The steamer was going at half speed, about five knots, intending soon to anchor. The night was not dark, the steamer having been seen some four or five miles ahead, by the hands on the schooner, and the schooner having been seen by the steamer some one and a half or two miles off, though there is some diversity of opinion among the hands on board of the steamer. Each vessel, however, saw the other in time to adopt, and follow out, proper measures to avoid the disaster. As it was the duty of the steamer to avoid the schooner in passing, assuming that the latter kept her course, the onus rests on the steamer to show that the schooner did not keep her course, or to show some other fault that contributed to the collision. This the steamer has undertaken to do; and she insists, that the schooner changed her course, as the two vessels approached each other, and thereby defeated the movement of the steamer, by starboarding her helm, to pass the schooner in safety, and go under the schooner's stern, the latter porting about the same time, and giving way in the same direction. The whole defence turns upon this position. The Court below found the schooner in fault, and dismissed the libel on this ground. After the best examination I have been able to give to the case, I regret to say, that I cannot

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concur in this opinion. I am forced to the conclusion, that this movement of the schooner was made under impending danger, and *in extremis*, and was one for which the steamer must be held responsible.

The clear weight of the proofs is, that the steamer was within from 300 to 400 yards of the schooner, and nearly dead ahead, when the latter ported her helm. The combined speed of the two vessels was about 12 or 13 miles an hour. They must have come together in a minute and a quarter, or less than two minutes, after the change of course by the schooner. There were five hands on the schooner, including the master, all of whom were on deck and witnessed the collision, and maintain this account of it. In addition to this, five of the hands on board of the steamer, including the pilot, have been examined for the libellants, and confirm it. So do the master, the second mate, and the wheelsman of the steamer, who were examined for the claimants. The master, Hilton, says that the schooner was a mile, more or less, off when he discovered her, but he would not name the distance; that it was a very short time afterward, but he would not say how short, that the collision occurred; and that it occurred a very short time after the schooner changed her course, but he would not say how short, although pressed by the counsel for the libellants. This master seems to have been quite uninformed as to his duties. He says that if two vessels, one a steamer and the other a sailing vessel, are approaching head and head, it is the duty of each to port and go to the right; and that there is no distinction between a steamer and a sailing vessel and two steamers, as to the duty. The second mate, Cowen, says, that he went up on the forecastle, on hearing the schooner reported; that he then first saw her; that it was about five minutes after he saw her that the collision occurred; that the schooner was about a quarter of a mile off when he first saw her; and that she was very close when she crossed the steamer's bows. He adds: "As near as I can judge, she, the schooner, was not more than the length of our ship, 250 or 300 feet off, when she altered her course." Again, he repeats,

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in answer to the question: "Q. About how far off was the schooner from you when she commenced to put her helm to port? A. I judge somewhere between 250 and 300 feet." The quartermaster, Kain, who was at the wheel, says, that the schooner was a very short distance off when he first saw her; and that the master blew the whistle a very short time after this. To the question, "Q. How long was it after blowing the whistle, that the schooner kept away," he answers, "A. Right away. Q. How soon? A. Quick as thought. Q. She had not kept away before that, had she? A. No, sir." The same witness states: "I put the wheel hard-a-starboard by his, the captain's, orders. Q. Before or after the whistle blew? A. Immediately after the whistle blew."

Now, this testimony strongly corroborates the account of the collision given by the hands on the schooner. To them the steamer appeared to be approaching nearly ahead, and, as she neared them without any indications of a change of course, it is not surprising that some alarm should have existed on board of the schooner. Her master says, that, in this state of anxiety, and when a collision seemed almost inevitable, he heard the whistle of the steamer—one long blast—which he took to mean, or indicate, that the schooner should go to the right, and that he immediately ported her helm and bore away. The hands on the schooner say, that, at this point of time, the steamer was only some 300 or 400 yards off. The master of the steamer says, that the collision was a very short time after the change of the course of the schooner. The second mate of the steamer says, that the schooner was only 250 or 300 feet off when the change took place; and the quartermaster, who was at the wheel on the steamer, says, that the schooner did not change her course till after the captain blew the whistle. This last witness also says, that the schooner was but a very short distance off when he first saw her; that the whistle was blown a very short time after this; that it was still later when the schooner first changed her course; and that he did not starboard his helm, or make any change in the course of the steamer, until after the whistle was blown.

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The pilot of the steamer agrees with the hands on the schooner, that the latter was not over 300 yards off when she changed her course. According to his account of the transaction, the schooner, when her light was first discovered, was supposed by him, and the master, to be a vessel at anchor, and they steered directly toward her, till they discovered she was under way, when they starboarded their helm.

Upon the whole, I feel a very strong conviction, on the evidence, that the steamer, before changing her course, had approached so near to the schooner, that there was not only a well-grounded fear of a collision, but actual danger of it. This must be so, whether the weight of it be regarded as establishing that the change of course by the steamer took place when the distance between the two vessels was 300 or 400 yards, or, according to the master of the steamer and some of her hands, a very short time after the schooner changed her course, or when the schooner was some 250 or 300 feet off, as stated by the wheelsman. It is not surprising, when we take into the account the disparity in the size and momentum of the two vessels, the steamer being of 2,500 tons, and the schooner of 150, that, on their approaching within 300 or 400 yards distance of each other, which, at their combined speed, would cause them to meet in less than two minutes, or, according to the distance as fixed by the wheelsman of the steamer, within about as many seconds, some alarm should exist on board of the schooner; and, even if her change of course was in a direction that contributed to the disaster, which is doubtful, the fault must be attributed to the steamer. The river, at the place of the collision, is from four to five miles wide. There was, therefore, no excuse for the near approach of the steamer to the schooner, in passing her. There was abundance of room, clear of all obstructions, for the steamer to pass, and give to the schooner a wide berth. The truth seems to be, that the schooner was not discovered by the steamer until she was very near. The master, though strongly pressed, would not say that she was a mile off; and some of the hands say half a mile. The evening

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was not dark, and a vessel's lights could have been seen two or three miles without difficulty. Some ill feeling seems to have existed between the master and the pilot of the steamer. Both of them, according to the proofs, were engaged in giving orders at the time of the disaster; and the master strongly intimates that the pilot was incompetent. Still, the wheelsman says that he took his orders from the pilot, and the lookout says that he communicated with the pilot, and even the master, Hilton, says, that he obeyed the pilot's orders.

The decree below must be reversed, and a decree be entered for the libellants, with a reference to ascertain the damages.

THEODORE E. WINANS

vs.

THE MCKEAN RAILROAD AND NAVIGATION COMPANY. IN
EQUITY.

Where a suit is brought in a State Court, and is duly removed into this Court, by the defendant, under the 12th section of the Act of September 24th, 1789, (1 *U. S. Stat. at Large*, 79,) the question of the jurisdiction of this Court is not dependent upon any of the provisions of the 11th section of that Act.

A defendant who voluntarily appears in a suit in this Court, waives his right to urge, as an objection to the jurisdiction of this Court, that he was not found, or served with process, in this District.

Where a bill is filed, in this Court, against a corporation created by the State of Pennsylvania, by a judgment creditor thereof, for a sequestration of its property, rights, and franchises, and for the appointment of a receiver thereof, with power to collect from its stockholders the amount of their unpaid subscriptions, or sufficient thereof to satisfy such judgment, and for the payment therewith of such judgment, it is a sufficient statement, in such bill, of the amount and value of such unpaid subscriptions, to state that it has unpaid subscriptions to its stock much more than sufficient to pay such judgment.

The fact that such corporation has no property in this District, and no property any where, but the demands for such unpaid subscriptions, is no objection to the jurisdiction of this Court, and no defence to such suit.

The cases of *Mann v. Pentz*, (3 *Comstock*, 415,) and *Dayton v. Borst*, (31 *N. Y. R.*, 435,) considered.

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The case of *Dayton v. Borst* maintains the right of a receiver of a corporation appointed under a judgment creditor's bill, to recover the balance unpaid upon subscriptions to the capital stock of such corporation, without any previous call for the payment of such subscriptions having been made by such corporation, and, as the latest exposition of the law of the State of New York on the subject, by its highest Court, is adopted by this Court.

(Before HALL, J., Northern District of New York, October 9th, 1868.)

THIS case came before the Court, on a demurrer to the plaintiff's bill of complaint.

HALL, J. The bill sets forth, in substance, that the plaintiff is a citizen of the State of New York, and the defendant a corporation created under and by virtue of the laws of the State of Pennsylvania; that, heretofore, the plaintiff, being a citizen of New York, commenced an action in the Supreme Court of that State, against the defendant, for the same cause of action afterward stated in the bill; that, thereupon, the defendant, by the means, and in the mode, prescribed by law, and duly set forth in the bill, removed the case to this Court for trial, in pursuance of the Act of Congress; that afterward, and at the next term of this Court, the defendant filed, in this Court, a copy of the process served upon it in this action, in said Supreme Court, and entered its appearance in the said action, so removed to this Court for trial; that the defendant was, on the 10th of August, 1858, and still is, a corporation created under and by virtue of the laws of Pennsylvania, and is a citizen of that State; and that the defendant has its principal office and place of business in the city of New York. The bill then proceeds to state the regular recovery of a judgment in favor of the plaintiff, against the defendant, in the Supreme Court of the State of New York, for more than nine thousand nine hundred dollars, for money lent; that such judgment was recovered in September, 1865, and duly docketed; that executions were issued thereon, and duly returned wholly uncollected; and that the judgment remains wholly unpaid. The allegations in respect to such judgment and executions, and the return

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of such executions, are, in fact, those which are ordinarily required in a judgment creditor's suit, prosecuted for the purpose of reaching the equitable assets of the debtor. The bill then further states, that, since the recovery of such judgment, the plaintiff has made diligent efforts to have such judgment prosecuted, and to commence an action for the recovery thereof, in Pennsylvania; that he has not been able to find any of the officers of the defendant upon whom to serve process in that State, or any property belonging to the defendant, in that State, to attach, so as to commence an action therein; that all of the directors of the company reside in the city of New York, and all, or nearly all, of the stockholders thereof reside in that city; that the defendant has no office or officer any where in the State of Pennsylvania, and is not engaged in any business in that State, and has no property of any kind therein, and has no property in the State of New York, or elsewhere, subject to levy and sale on execution; that the only property or means which the defendant has, is the demand of the defendant against its stockholders, for the portion of their subscriptions remaining unpaid; and that the defendant has subscriptions to its stock remaining unpaid, and which have never been called for or required to be paid by the defendant, or its directors, much more than sufficient to pay the judgment of the plaintiff. The bill, then, without setting out any of the provisions of the defendant's charter, or of the laws under which it was incorporated, or any thing in regard to the terms, or legal effect, of the alleged subscriptions which have not been paid in full, or whether the parties who made such subscriptions are still stockholders in the corporation, and, in short, without setting out any thing beyond the fact of there being such unpaid subscriptions, to show that the corporation has a present, or any future, right of action to recover the unpaid balance of such subscriptions, and without making any of the persons whose subscriptions are unpaid, parties to the bill, proceeds to pray for a sequestration of the property, rights, and franchises of the defendant, and for the appointment of a receiver, with the usual powers to receive

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the property, rights, and franchises of the defendant, and to collect and receive from the stockholders of the defendant the amount of their subscriptions unpaid, or sufficient thereof to satisfy the plaintiff's judgment, with interest and costs; and that such receiver may be directed, by the judgment of this Court, to pay over to the plaintiff the amount of such judgment, interest, and costs. It also contains the prayer for general relief.

To this bill the defendant demurs, and assigns as causes of demurrer: (1.) That it appears, by the bill, that the defendant is a citizen of the State of Pennsylvania, and that all of its property and effects are within that State, and that the property and effects sought to be reached by, and through, this action, are in that State, and that none of the same are in the State of New York; (2.) That it does not appear that the defendant has any property or effects whatever, to be used, or applied, in or towards the satisfaction of the judgment mentioned and described in the bill; (3.) That it does not appear that the defendant holds against its stockholders, or any of them, any demand for any portion of their subscriptions, or that any portion thereof is unpaid, or that any portion thereof is collectable; (4.) That the plaintiff has not, in and by his bill, made and stated such a case as does, or ought to, entitle him to any such discovery, or relief, as is sought, and prayed for, from and against the defendant. There is also a fifth formal cause of demurrer assigned, but it is only a reiteration, in a different form, of the substance of the cause of demurrer fourthly assigned.

As it was conceded on the argument, and is substantially stated in the bill, that this suit was first instituted in a State Court and removed to this Court for trial, according to the provisions of the 12th section of the Judiciary Act, it is unnecessary to discuss the questions presented by the cause of demurrer firstly assigned, or to examine the numerous cases cited on the argument to show that this Court has no jurisdiction of this case by reason of the character and citizenship, or legal domicil or locality, of the defendant. If this question

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of jurisdiction depended upon the provisions of the 11th section of the Judiciary Act, most of the cases cited would be pertinent; but, as it depends wholly upon the provisions of the 12th section, a sufficient authority for holding that the demurrer cannot be sustained upon the grounds stated, is furnished by the cases of *Bliven v. The New England Screw Co.*, (3 *Blatchf. C. C. R.*, 111;) *Barney v. The Globe Bank*, (5 *Id.*, 107;) *Sayles v. The North Western Ins. Co.*, (2 *Curtis' C. C. R.*, 212;) *Clarke v. The New Jersey Steam Navigation Co.*, (1 *Story's R.*, 531.) But, even in a case within the 11th section of the Judiciary Act, a defendant who is not found, or served with process, in the district in which the suit is brought, waives his right to object to the jurisdiction upon that ground, by voluntarily appearing in the suit, as the defendant did in this case, by entering his appearance in this Court, as alleged in the bill. The immunity which, under the 11th section of the Judiciary Act, is, in certain cases, secured to a defendant not so found or served with process, is a personal privilege which he may always waive; and he does waive it by entering his appearance. (*Toland v. Sprague*, 12 *Peters*, 300; *Clarke v. The New Jersey Steam Navigation Co.*, 1 *Story*, 531, 540; *Flanders v. The Etna Ins. Co.*, 3 *Mason*, 158; *Harrison v. Rowan*, 1 *Peters' C. C. R.*, 489; *Gracie v. Palmer*, 8 *Wheaton*, 699; *Logan v. Patrick*, 5 *Cranch*, 288; *Irvine v. Lowry*, 14 *Peters*, 293.)

The objection that the property and effects of the defendant which it is the object of the bill to reach, are in the State of Pennsylvania, and all the objections stated in the second, third, and fourth causes of demurrer assigned, may, perhaps, be properly considered together; or else, as having such direct and close connection as to justify the omission to consider each separately and in its order.

The bill alleges, in substance, that the defendant has no property of any kind in Pennsylvania, and that the only property or means which it has is its demand against its stockholders for the proportion of their subscriptions remaining unpaid; but it alleges that the defendant has subscrip-

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tions to its stock remaining unpaid much more than sufficient to pay the plaintiff's debt. Taken together, these allegations can hardly be said to show that the defendant is without means to pay the plaintiff's debt. The alleged sufficiency of these unpaid subscriptions would seem to require that their value as well as their amount should be more than equal to the plaintiff's debt; and it must be admitted that the allegation of value would have been more clearly appropriate and sufficient, if the value of these subscriptions, or their amount, and the pecuniary responsibility of such subscribers, had been directly alleged, and not been left to be inferred from the somewhat indefinite statement just referred to. The question is not free from doubt, but I am inclined to think that the bill is sufficient in so far as this statement of amount and value is concerned, and shall therefore proceed to consider the more serious questions still remaining for discussion.

The right to require payment of these amounts of unpaid stock, if it can be considered as the property or effects of the defendant, must belong to the defendant as a Pennsylvania corporation, and, as a chose in action, must be considered as property of the defendant in Pennsylvania, where and where only the body corporate exists. If it is, as yet, a mere right of the corporation, by a resolution of its board of directors or managers, to call for the payment of the balance unpaid, by instalments or otherwise, it is a right which can be made the basis of an action at law against the stockholders only, upon and by means of the proper action of a Pennsylvania corporation; and, probably, this action cannot be enforced by this Court, for want of power to compel the directors or managers of this foreign corporation to make the necessary calls for such payment. If the proper calls have been made, or if a suit at law could now be sustained by the corporation, without any such call having been made, to enforce payment, such a right of action follows the locality of the corporation or creditor, and, so far as locality is concerned, must be considered as assets of the defendant in Pennsylvania, and not within the jurisdiction of this Court—and this whether the

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written subscription, or other evidence of such subscription, be within this district or in Pennsylvania.

But I am inclined to the opinion that the fact that the defendant has no real or personal property, choses in action or equitable interests, in this district, is not, of itself, an objection to the jurisdiction of this Court or a sufficient defence to the present bill. The actual appearance of a foreign corporation as a defendant, gives to this Court the same right to grant a proper decree upon the case made, that it would have the right to make under like circumstances against a natural person proceeded against for the same cause of action; and the case of *Mitchell v. Bunch*, (2 *Paige*, 606,) cited and relied upon by the defendant, as well as several English cases there cited by Chancellor Walworth, would seem to authorize this Court to make a decree in a judgment creditor's suit, requiring the defendant to transfer to a receiver real and personal estate, situated in a foreign country, and choses in action belonging to him, though he might be a resident of a foreign country, in order to secure their application to the satisfaction of the judgment of the plaintiff in such suit. It is not, ordinarily, a sufficient defence to an action at law or a suit in equity, that the plaintiff will not be able to enforce the judgment or decree to which he would otherwise be entitled; but, in a judgment creditor's suit brought to enforce the payment of such creditor's demand out of the equitable interests and assets of the defendant which are not subject to execution at law, the precise ground of relief is, that the Court of Equity can enforce the remedy sought, while it cannot be obtained in a common law Court; and, in such suits, a Court of Equity ought not to allow the parties to go through a long course of expensive and, perhaps, vexatious litigation, when it is apparent that it must be fruitless in its result. This makes it necessary to consider the more important questions which relate to the actual merits of this case, and the extent of the relief which can be afforded to the plaintiff under his bill as now framed, through the action of a receiver or otherwise.

It is very clear, that the capital stock of the corporation

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defendant, and any unpaid portions of such capital stock, must be considered, in equity, as a trust fund, specifically charged with the payment of the debts of the corporation. (*Mann v. Pentz*, 3 *Comstock*, 415, 422; *Spear v. Grant*, 16 *Mass.*, 9; *Wood v. Dummer*, 3 *Mason*, 308; *Briggs v. Penniman*, 8 *Cowen*, 387; *Slee v. Bloom*, 19 *Johnson*, 456, 474; *Hume v. Winyaw Co.*, 4 *Am. Law Mag.*, 92; *Ward v. Griswoldville Mfg. Co.*, 16 *Conn.*, 593; *Nathan v. Whitlock*, 9 *Paige*, 152; *Dayton v. Borst*, 31 *N. Y. R.*, 435.) This being so, it must necessarily follow, that a Court of Equity, upon a bill properly framed, in a suit brought by and against all proper parties, would grant the equitable relief to which the plaintiff might be entitled. (See cases just cited.) This brings us to the questions whether, in this case, the proper parties are before the Court, and whether the bill states a case which entitles the plaintiff to the relief, or any portion of the relief, prayed for in the bill.

The case of *Mann v. Pentz*, *ubi supra*, apparently decides, that the allegations of the bill in this case would be insufficient to authorize a decree against any single stockholder of a railroad corporation created by the Legislature of this State, who might have been made a party to such a bill; and that any receiver who might be appointed in such a suit would have no right, in any event, to prosecute, either at law or in equity, an individual stockholder, for the recovery of the sum unpaid upon his stock. If that case stood alone, it would create very serious doubts, whether a receiver appointed in this case could maintain any action at law or suit in equity, for the purpose of enforcing payment of the amount still unpaid upon subscriptions to the capital stock of the defendant; and it might well be doubted, whether the liability of a stockholder upon his unpaid subscriptions could be enforced in the Courts of this State, except by a suit in equity, in behalf, or for the benefit, of all the creditors of the corporation, and against all the stockholders in default. The stockholder's liability to creditors of the corporation was apparently considered, in that case, as a statutory liability only, and it was said that the

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stockholder could only be made liable to the corporation by regular calls, in pursuance of its charter ; but the subsequent case of *Dayton v. Borst*, (31 *N. Y. R.*, 435,) seems to be opposed to the case of *Mann v. Pentz*, on these points, (unless there is a difference between the two cases by reason of the fact that one was a New York corporation and the other a corporation of New Jersey,) and to maintain the right of a receiver, with the ordinary powers of a receiver appointed under the bill of a judgment creditor, to recover the balance unpaid upon subscriptions to the capital stock of the corporation of which he has been made receiver, without any previous call being made by the corporation. The 13th section of the Act creating the corporation in which the defendant in *Mann v. Pentz* was a stockholder, provided for calls upon the stockholders, and notice thereof, and for the forfeiture of stock in case the calls thereon were not paid ; and it may have been properly considered by the judges who decided the two cases referred to, that this 13th section, in effect, required calls to be made before any action could be brought for the recovery of the amount unpaid upon the subscriptions of its stockholders, although I confess that my own first impression was, that the provision referred to required such calls, and notice thereof, only in cases where a forfeiture of the stock was contemplated. The rights of the parties were also considered to depend upon the New York statutes in reference to insolvent corporations, and these facts may, perhaps, distinguish the case from that of *Dayton v. Borst*. The cases of *Mann v. Pentz* and *Wood v. Dummer* were cited by Judge Davies, in delivering the opinion of the Court in *Dayton v. Borst*, and there is nothing in his opinion, showing that the Court intended expressly to overrule the decision in *Mann v. Pentz*. Nevertheless, the two cases appear to me to be irreconcilably in conflict, unless the case of *Mann v. Pentz* proceeded upon the ground that, under such 13th section, there could be no liability against the stockholder, unless a call had been made in pursuance of that section, or upon the ground that the statute of New York had provided

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a different remedy against delinquent stockholders; and the later case, in which the plaintiff was the receiver of a foreign corporation, "with power" (as is stated) "to sue for, collect, receive, and take into possession, all the goods, rights, and credits" of such corporation, shows that a receiver with these powers, (such as are ordinarily conferred upon receivers under judgment creditors' bills), had a right to sue for the unpaid balance of subscriptions, and that, when there was nothing to the contrary appearing in the case, the receiver might recover the amount, without showing any thing more than the fact that the defendant had become a stockholder, and had failed to pay the full amount of his stock.

The case of *Dayton v. Borst* seems to be full authority for the position, that a receiver appointed in this suit would, under the case made by the bill, be entitled to recover the unpaid balances due from the stockholders of the defendant, to such extent as would enable him to pay the plaintiff's demand; and, as the question is one of State law, and the decision in *Dayton v. Borst* was made by the highest Court of the State, without the express dissent of any of its judges, I shall rule the demurrer in this case on the authority of that decision, as the latest exposition of the law of this State upon the questions involved in its determination.

I confess, that a bill framed according to the views expressed in the cases of *Wood v. Dummer* and *Mann v. Pentz*, and making the corporation, and its delinquent stockholders, parties defendants, seems to me a more appropriate form of proceeding in the case of a domestic corporation; and no insuperable objection to adopting that form of proceeding in the case of a foreign corporation, at least so far as to make stockholders in default parties defendants in a State Court, now occurs to me, or has been suggested by the counsel. The equitable attachment of the demand of the corporation against such defaulting stockholders, thus made defendants, would be an important consideration in favor of such a form of proceeding; but, as it has not been adopted in this case, it is not necessary now to decide whether such a bill could be maintained upon the case stated by the plaintiff.

Greenleaf v. Schell.

The demurrer is overruled, but with leave to the defendant to answer, within thirty days after notice of the order overruling the demurrer, on the payment of costs.

R. C. GREENLEAF AND OTHERS

vs.

AUGUSTUS SCHELL.

In a suit brought against a collector of customs, to recover back duties paid under protest, it is, under the Act of February 26th, 1845, (5 *U. S. Stat. at Large*, 727,) an indispensable item of proof, to be made by the plaintiff, on the trial of the suit, that such a protest as that Act requires was made.

Where the verdict in such a suit is, that, by consent of counsel, the jury find for the plaintiff, "for the amount, with interest, of the excess of duties paid under protest, on more than two *per cent.* commission on all importations specified in the bill of particulars in this cause, from the Continent of Europe, except Paris, the amount to be adjusted by the clerk of this Court or his deputy," and the clerk reports that, according to his adjustment the plaintiffs are entitled to judgment for a sum named, the report cannot be excepted to on the ground that the duties are shown to have been paid by a certain firm, and that the plaintiffs did not prove before the referee that they composed that firm when the duties were paid, or that they alone paid the duties.

Even if such objection be not one which ought to have been taken by plea in abatement, as being an objection that some party who ought to have been joined as a plaintiff in the suit, was not joined, the verdict cures any defect in that regard.

Such verdict must be considered as being also an order of reference made by the Court and entered in its minutes, and confines the action and duty of the referee to an arithmetical adjustment and computation of amounts, on the basis of computation prescribed in the verdict.

Under such verdict, the plaintiff is not required to prove before the referee that the duties were paid under protest.

(Before BLATCHFORD, J., Southern District of New York, October 19th, 1868.)

THIS was an action against the collector of the port of New York, to recover back an excess of duties alleged to have been paid to him under protest.

Almon W. Griswold, for the plaintiffs.

Simon Towle, for the defendant.

BLATCHFORD, J. The foundation of any claim by the plaintiff in such an action as this, is, that the alleged illegal duties exacted by the collector must have been paid under a proper protest. The Act of February 26th, 1845, (5 *U. S. Stat. at Large*, 727,) provides, that no action shall be maintained against any collector, to recover the amount of duties paid under protest, "unless the said protest was made in writing, and signed by the claimant, at or before the payment of said duties, setting forth distinctly and specifically the grounds of objection to the payment thereof." In such a suit, therefore, it is an indispensable item of proof to be made by the plaintiff, on the trial of the suit, that such a protest as the statute requires was made. Such proof may be made by producing the protest, and showing when it was made, or by proving its contents and when it was made, if it be lost, or by the admission and consent of the defendant in proper form, in open Court or otherwise, that such a protest was made. In the present case, the issue, which was raised by the plea of the general issue to the declaration, was tried before this Court and a jury, on the 26th of February, 1864. The verdict of the jury was in these words: "By consent of counsel, the jury find a verdict for the plaintiffs in the above-entitled cause, for the amount, with interest, of the excess of duties paid under protest, on more than two *per cent.* commission on all importations specified in the bill of particulars in this cause, from the continent of Europe, except Paris, and on more than one and a half *per cent.* commission on importations from Great Britain, and a like verdict for the excess of duty paid under protest, on the importations specified in the bill of particulars in this cause, upon charges, above those set forth in the reports of Isaac Phillips, appraiser, dated October 13th, 1856, and of the several subsequent dates, as modified by Treasury Instructions dated May 21st, 1863, the amount to be adjusted by the

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clerk of this Court or his deputy." The adjustment under this verdict has proceeded before the clerk, and he, by his report, filed October 3d, 1868, reports, that, according to his adjustment, the plaintiffs are entitled to judgment on the verdict, for \$338.85 principal, and \$270.23 interest—in all, \$609.08. The defendant has excepted to the report on two grounds, and the exceptions have been argued on the report, and on the record of the testimony and proceedings on the reference.

1. The first exception is, that the duties are shown to have been paid by the firm of C. F. Hovey & Co., and that the plaintiffs did not prove before the referee that they composed that firm when the duties were paid, or that they alone paid the duties. It is too late to take this objection. The point of the objection is, that some party who ought to have been joined as a plaintiff in the action, was not joined. Even if this objection be not one which ought to have been taken by plea in abatement, the verdict cured any defect in this regard. Independently of this, I regard the verdict, which must be considered to be also an order of reference made by the Court and entered in its minutes, as confining the action and duty of the referee solely to an arithmetical adjustment and computation of amounts, on the basis of computation prescribed in the verdict, and as affirming that the plaintiffs are entitled to the judgment which will follow the verdict, for the excess, to be so computed, of duties paid on the importations specified in the bill of particulars. If some parties other than the plaintiffs paid such duties, so as to be really entitled to the return of them, it was for the defendant to show that fact on the trial before the jury. At all events, the referee had nothing to do with that question, under the terms of the reference to him.

2. The second exception is, that the plaintiffs did not prove before the referee that the duties in question were paid under protest. In regard to this exception, the defendant insists that the terms of the verdict require that the plaintiffs shall make proof before the referee that the duties were paid

under protest. I do not so understand the verdict. I understand it to affirm, that the excesses of duties paid, if any such excesses shall be found, by the computation and adjustment of the referee, to have been paid, on the importations specified in the bill of particulars, were paid under protest. Unless they were paid under protest, there could be no verdict for the plaintiffs, because, by the express provision of the Act of 1845, before referred to, no action for them would lie. Proof of such payment under protest laid at the threshold of the plaintiffs' case at the trial, and, unless such proof was made, it was the duty of the Court to instruct the jury that the plaintiffs could not recover. Such proof could be made as well by the admission and consent of the attorney for the defendant as in any other way. In the present case, it appears by the verdict to have been made by such admission and consent. The verdict must be held, in the absence of any reservations in it, to cover every thing which the plaintiffs would have been obliged to prove; on the issue joined, to entitle themselves to a verdict. The verdict here covers every thing but the amounts of the excesses. As to those, the referee is to compute them, on the specific basis set forth in the verdict. But he has no other duty to perform.

It frequently happens, that, in a verdict in a suit to recover back duties paid under protest, the verdict is expressly made, on its face, subject to the opinion of the Court as to the sufficiency of the protest, or that the verdict provides, that, if it shall appear, on the adjustment by the referee or otherwise, that the question of the timeliness of the protest, or the question of a prospective protest, is involved, the verdict shall be opened. But there is no such reservation in the verdict now in question. That being so, the parties cannot, on the hearing before the referee, or by exception to his report, go back of the verdict, or go at all into any questions in regard to the protest.

This question has been heretofore settled by this Court. In the case of *Lottimer v. Redfield*, decided by Mr. Justice Nelson, in December, 1863, the verdict of the jury, which

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was given on the 2d of May, 1861, was in form precisely like the verdict in the present case, and was a verdict by consent, and the Court held that the verdict was conclusive upon the referee as to the protest.

The exceptions to the report are overruled.

HENRY B. GOODYEAR, ADMINISTRATOR, &C., AND OTHERS

v8.

T. S. RUST. IN EQUITY.

The use of the process described in the patent granted to Edward L. Simpson, for preparing hard rubber or vulcanite, is an infringement of the Nelson Goodyear hard rubber patent.

(Before SHIPMAN, J., Connecticut, November 7th, 1868.)

THIS was a motion for a provisional injunction, founded upon the well known Nelson Goodyear patent for vulcanizing rubber and other similar gums, commonly known as the "hard rubber" patent.

Charles F. Blake and Hubbard & Hyde, for the plaintiffs.

Stephen D. Law and H. T. Blake, for the defendant.

SHIPMAN, J. The validity of this patent has been so often sustained by adjudications, that no question will be considered, in deciding the present motion, except that of infringement. The bill of complaint in this case is supported by affidavits, which clearly entitle the plaintiffs to the injunction prayed for, unless the defendant's proofs overcome or avoid their effect. The defendant works under the patent of Edward L. Simpson, and uses the compound made in accordance with the process described in that patent. The plaintiffs allege, that

this process is clearly within the scope of Goodyear's invention, as described in his patent, and is, therefore, an infringement of their rights. This is denied by the defendant, and the question, so far as it is necessary for the determination of this motion, is now to be decided.

Avoiding all useless rehearsal of the details of this Goodyear patent, and of the repeated litigations to which it has been subjected, it may be briefly stated, that the process covered by it is secured by mixing about four ounces of sulphur and one pound of rubber, and subjecting this mixture to not less than from 260° to 275° of heat, Fahrenheit's scale. This, under proper conditions of place and time, produces the compound or substance known as vulcanite, a material now well known in the mechanic arts. The vital question involved in the present controversy, relates to the proportions of sulphur and rubber, and the degree of heat. Does the Simpson process substantially embrace these proportions and this degree of heat? If it does, then it is an infringement of the plaintiffs' rights.

The defendant denies that the Simpson process does embrace all these proportions, as effective agents or active forces in accomplishing the work of vulcanization. In support of this denial, he has adduced affidavits of distinguished chemists, who give a delineation of the elements which enter into Simpson's mixture and produce his vulcanite. It will be sufficient, in this place, to refer to the affidavit of Professor Seely, as that contains all the materials of the defence to this motion. Professor Seely says, that the substances used by Simpson in the preparation of his hard rubber, are sulphur, gum-benzoin, oil, and common rubber, and that his manner of using these substances, as set forth in his patent, is as follows: He mixes two ounces of benzoin with sixteen ounces of sulphur, and to sixteen ounces of this mixture he adds one quart of linseed oil. This mixture of sulphur, benzoin, and oil is then subjected to the proper degree of heat, and the result is the substance which he calls his vulcanizing compound. To make hard rubber, or vulcanite, he takes from ten to four-

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teen ounces of this compound and one pound of rubber, and thoroughly mixes them, by grinding between warm rolls. He then subjects this mixture of rubber and vulcanizing compound to a heat of 320° Fahrenheit. The result is a vulcanite.

Without rehearsing the details of the analysis presented by Professor Seely, it may be stated, that the quantity of this compound which is necessary to perfectly vulcanize one pound of rubber, contains, in some form, not much less (to use the language of Goodyear's specification) than four ounces of sulphur. In other words, this amount of sulphur goes into this quantity of the compound, and forms one of its original elements. About half of this sulphur chemically combines with the oil, and forms what Professor Seely calls vulcanized oil, and the other half exists, in the mass of vulcanized oil, in the form of free sulphur. Vulcanized oil alone, when mixed with rubber, will not vulcanize the latter, according to the evidence before me. Professor Seely says: "The effect of vulcanized oil, on mixing and heating with rubber, is not at all chemical. The rubber does not, in any chemical sense, become vulcanized. Whatever advantage there be in the use of vulcanized oil with rubber, must be wholly due to physical and molecular causes, and cannot be accounted for on any theory of vulcanization based on Goodyear's processes. A quantity of vulcanized oil containing four, or even sixteen, ounces of sulphur, may be mixed and heated with one pound of rubber, and not an atom of Goodyear's hard rubber can be produced." He then goes on to say: "Simpson's compound is composed of vulcanized oil and free sulphur. When the compound is rolled and heated with rubber, the free sulphur, no doubt, acts upon the rubber with its full efficiency; and, in estimating the vulcanizing, or hardening, properties of the compound, the value of the free sulphur, if any, must be conceded. It is, therefore, necessary to compute the amount of free sulphur in Simpson's compound." This computation he then proceeds to make, and the result is, as I have stated—one-half of the sulphur is

combined with the oil chemically, and the other half remains free, or, as Professor Silliman expresses it, is "entangled in the mass of this compound." Professor Seely says, of this compound: "The free or effective sulphur is exactly one-half of the whole contents of sulphur." What part the benzoin plays in the compound does not appear from the evidence. But I gather, from Simpson's specification, that "its vaporizing qualities more perfectly expel the fumes of the sulphur, as well as the odor, from the oil, and render the compound nearly, if not perfectly, odorless." In the performance of this office, it may be an improvement on Goodyear's process.

It is conceded, then, that vulcanized oil (oil and sulphur chemically combined) will not produce, when mixed with rubber and heated, vulcanite. There is no proof that the benzoin renders the vulcanized oil any more effective as a vulcanizing agent. It is equally conceded, by the defendant's evidence, that the quantity of free sulphur in Simpson's compound cannot alone vulcanize. It is asserted that the vulcanized oil, and the free sulphur scattered through it, do successfully vulcanize, whenever the mass of compound applied to one pound of rubber contains, in the whole, not much less than four ounces of sulphur in all, free and combined. Such a proportion of the mass to the pound of rubber is necessary to comply with the conditions of Simpson's patent. We have, then, Goodyear's invention, which consists in combining not much less than four ounces of sulphur, with one pound of rubber, and submitting the same to not much less than 260° to 275° of heat, Fahrenheit's scale. We have Simpson's process, which consists in combining not much less than four ounces of sulphur, with one pound of rubber, and subjecting the same to a heat of 320°, Fahrenheit's scale. The distinction which is sought to be made between these two compositions, or processes, is founded upon the claim that, in Simpson's, one-half of the sulphur is first chemically combined with oil, forming a new substance termed vulcanized oil, and, while there, though acting in the same mass with the remaining

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half of the sulphur, as an auxiliary vulcanizing agent, acts in a different way from the free sulphur itself. In other words, half the quantity of sulphur necessary to vulcanize under Goodyear's process, has disappeared, and exists no longer, except as it is represented in a new chemical substance called vulcanized oil. The other half remains. But neither the half that remains, nor any quantity of the new agent, can alone vulcanize. Yet the two, acting together, at once perform this important office, and produce the same result as Goodyear's combination.

I have said that it appears, from the evidence, that the *chemically combined* elements of the compound of Simpson will not alone, when mixed with rubber, and heated, produce vulcanite. I infer this from the language already cited from Professor Seely's affidavit, where he says: "A quantity of vulcanized oil containing four, or even sixteen, ounces of sulphur may be mixed and heated, with one pound of rubber, and not an atom of Goodyear's hard rubber can be produced. Simpson's compound is composed of vulcanized oil and free sulphur." I have not failed to notice that the language is, that the vulcanized oil, in combination with the rubber, will not produce "an atom of *Goodyear's* hard rubber." But, as the whole scope and direction of the defence are aimed at establishing a distinction between the *processes*, and not between the *products*, I can come to no other conclusion than that the compound alone, if destitute of free sulphur, would not, when mixed with rubber, perform the office of vulcanization. It is true, that the compound, when made according to the patent of Simpson, always contains one-half of the sulphur in a free state, but it is agreed, on all hands, that this amount of free sulphur alone will not vulcanize. So the evidence, in whatever light we view it, proves that that portion of the compound which contains the elements in chemical combination is powerless, without the aid of the uncombined free sulphur, which is scattered through the pores of the combined mass.

Now, it may be asked, how do these two agents, namely,

vulcanized oil and free sulphur, perform, by their united forces, the work of vulcanization? No part of this work is assigned, by the evidence, to the benzoin. It cannot be done by the chemically combined oil and sulphur alone. It cannot be done by the free sulphur alone. The latter, to the extent of its effective power, for all that appears in this case, works in the same way that it does in Goodyear's process. The effect of the former, (oil and sulphur chemically combined,) Professor Seely says, is not chemical, but "must be due wholly to physical and molecular causes." But, whether the auxiliary vulcanizing force, whatever it is, exerted by the chemically combined oil and sulphur, is supplied by the latter or not, does not appear by the proof. From what has long been known, however, of the vulcanizing power of sulphur, when mixed with rubber, and heated, that agent, though combined with another substance, would naturally be looked to as the seat of this force. It may be true that, as Professor Seely says, the effect of vulcanized oil, in hardening rubber, is due not to chemical, but "to physical and molecular causes." Of the nature or significance of this distinction, in the scientific sense, I do not presume to speak. But I do not see how this fact avoids Goodyear's patent. I do not find, in his specification, any evidence that he rested his invention upon any such nice scientific distinction, or that he limited his claim to sulphur, when working through chemical, as distinguished from physical or molecular laws. If the validity of his patent rests upon such a scientific problem as this, I think its solution should, in the present case, be left to final hearing. The suggestion of such a problem, in *ex parte* affidavits, at a very late stage of a series of protracted litigations, in which every other defence has thus far failed, is not a valid answer to this motion.

There can be no question that Simpson uses a degree of heat within the scope of Goodyear's patent.

Let an injunction issue.

De Visser v. Blackstone.

SIMON DE VISSER, RECEIVER, &c.

vs.

WYLLYS BLACKSTONE AND OTHERS. IN EQUITY.

When a receiver, appointed by this Court, is vested with the title to, and possession of, real estate, as such receiver, his possession is the possession of this Court, and any attempt to disturb such possession by proceedings subsequently instituted in a State Court, or otherwise, without first obtaining the leave of this Court, is a contempt of this Court.

Where a receiver appointed by this Court brought a suit in equity, in this Court, against persons who claimed to have pre-existing liens on real estate, of which such receiver was in possession by virtue of his trust, to have the rights of such defendants, in respect of such liens, determined by this Court, and, if adjudicated in their favor, paid out of the proceeds of the sale of such real estate by the receiver, this Court made an interlocutory order requiring the defendants to release their liens, and setting apart, to be paid into this Court, out of the proceeds of the sale to be made of such real estate by the receiver, a sufficient sum to discharge such liens, with the costs of the suit, and *ten per cent.* in addition, to be held as a fund applicable to the payment of such liens, if they should be established by the decree of this Court to be prior in right to the claims of the plaintiff.

(Before BLATCHFORD, J., Southern District of New York, November 9th, 1868.)

THE plaintiff was appointed, by a decree made by this Court on the 19th of June, 1868, in a suit in equity, brought by James Drake and others against Francis Goodridge, as survivor, &c., and others, receiver of certain real estate, the title to which was conveyed to him, under said decree, on the 26th of June, 1868. The defendants in this suit were four several parties who claimed to have separate mechanics' liens on said real estate, which attached prior to the accruing of the plaintiff's title as receiver. Subsequently to the accruing of the receiver's title, one of those four parties instituted legal proceedings in the Court of Common Pleas for the city and county of New York, to enforce and foreclose his lien. The bill prayed that the plaintiff's title might be decreed to be

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prior in point of time, and superior in right and equity to the liens claimed by the defendants; that the defendants might release their liens to the plaintiff; and that an interlocutory order might be made directing the execution of such releases within some short day, to the end that the plaintiff might proceed, as receiver, to sell the real estate, and bring the proceeds into this Court, and have leave to withdraw all of the same for the purposes of his trust, except so much thereof as should be necessary to protect the defendants until the final decision in this cause. The plaintiff now moved for the granting of such interlocutory order.

Edwin W. Stoughton, for the plaintiff.

Cornelius J. De Witt, Moses B. Maclay, and William T. Graff, for the defendants.

BLATCHFORD, J. The plaintiff, having been appointed receiver by this Court, and having become fully vested with the title to, and possession of, the real estate in question, on the 26th of June, 1868, his possession is the possession of this Court, and any attempt to disturb such possession by proceedings, on the part of the defendants in this suit, in the Court of Common Pleas of the city and county of New York or otherwise, without first obtaining the leave of this Court, is a contempt of this Court. By the final decree made in the cause in which the receiver was appointed, he is directed to sell the real estate and bring the proceeds into this Court. The defendants commenced the proceedings to enforce their mechanics' liens in September, 1868. They claim that their liens attached in November and December, 1867, and are superior to the rights of the plaintiffs in the suit in which the receiver was appointed. Those plaintiffs and the receiver dispute this claim. Still, whatever rights the defendants have, as against the rights and possession of the receiver, their claims are, at most, pre-existing liens on the real estate. They are now brought into this Court by this suit, which is instituted

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in behalf of the plaintiffs in the suit in which the receiver was appointed, and in aid of that suit. The object of this suit is, in substance, to have the rights of the defendants, in respect of the liens set up by them, determined by this Court, and, if adjudicated in their favor, paid out of the proceeds of the sale of the real estate by the receiver, thus substituting, so far as those liens are concerned, the fund in Court realized from the sale of the real estate, in place of the real estate itself. This Court, sitting in equity, having the parties before it and the fund in its hands, will administer the fund according to the rights of the parties, and will give to the defendants all the rights against the fund which they could, under any circumstances, have against the real estate. These doctrines are fully laid down in the opinion of the Supreme Court, delivered by Mr. Justice Nelson, in the case of *Wiswall v. Sampson*, (14 *Howard*, 52.) The plaintiff is entitled to such relief as will enable him to sell the real estate free from the liens claimed by the defendants, and to have so much of the proceeds as shall be sufficient to pay the defendants' claims, if established, set apart to represent the real estate. An order will be entered, providing that the defendants bring into this Court, and file with the clerk thereof prior to a day to be named, a sworn statement of the amount of their respective alleged liens upon the said real estate; that, at the time of filing such statement, they respectively deliver to such clerk releases executed by them, in the form to be annexed to such order, releasing all liens which they have or claim on said real estate; that the plaintiff then proceed to sell said real estate, according to the terms of his trust as receiver; that the purchasers thereof pay to the clerk of this court, out of the purchase money thereof, such sum as shall cover the amount of said alleged liens in the aggregate, with the costs of this suit, with the addition of ten *per cent.* thereto, to abide the event of this suit, and to be held as a fund applicable to the payment of said alleged liens, and to be so applied in case this Court shall decree that the same ought to be so applied; that the rights of the defendants to said fund

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shall be and remain the same as they now are or would be to said real estate if such sale were not made, and if proceedings to enforce and foreclose such alleged liens were taken and prosecuted according to the statutes of the State of New York; that, on receiving such amount of such purchase money, the said clerk complete the releases, by inserting therein, as the releasees, the names of the purchasers of the premises, and deliver the releases, so completed, to such purchasers; and that he then deposit the sum of money so received by him with the United States Trust Company, on interest, to abide the further order of this Court.

THE SYRACUSE.

A steamboat was held in fault, in this case, for running at too high a rate of speed through a crowd of vessels, in the night time, the lights of such vessels being seen by her.

The practice of taking down by questions and answers, and not by way of narrative, the testimony given *viva voce*, in open Court, in Admiralty suits, reprobated.

Rules, on that subject, made by the Circuit and District Courts of this District.

(Before NELSON, J., Southern District of New York, November 20th, 1868.)

THIS was a libel *in rem*, filed in the District Court, by the owner of the steamboat Rip Van Winkle against the steamboat Syracuse, to recover for the damages caused to the former vessel, by a collision which occurred, on the Hudson river, between one and two o'clock, A. M., on the 16th of May, 1866, opposite the buoy on the west bank of Percy's Reach, near the city of Hudson, between the Rip Van Winkle and a barge that was in tow of and lashed to the port side of the Syracuse. The collision took place while the Rip Van Winkle was running diagonally across the river from its western shore to its eastern shore, she being bound up the river, and the Syracuse being bound down. The District Court

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decreed for the libellant, and the claimants appealed to this Court.

Dennis McMahon, for the libellant.

Erastus C. Benedict and *Robert D. Benedict*, for the claimants.

NELSON, J, after holding, that, on the proofs, the libellant had failed to sustain his position that the *Syracuse* caused the collision by suddenly altering her course, said : The proofs show that the *Rip Van Winkle* was clearly in fault in keeping up her high rate of speed while crossing the river at this reach, in the midst of the vessels which at this time occupied it. There were two tugs, with tows, on the western side, and one nearly opposite, on the eastern side. The morning was somewhat dark, with occasional starlight ; and one of the pilots on board of the *Rip Van Winkle* says, that, when he first saw the lights, it appeared as if the river was filled with vessels, and that they became the subject of conversation between him and the other pilot. And yet the pilot who was in charge of the navigation of *Rip Van Winkle*, admits that he did not slacken his speed, but crossed among these vessels at his usual rate. That rate was seventeen miles an hour.

I cannot avoid referring to the confused and painfully tedious mode of taking the evidence in this case, by questions and answers, and not by way of narrative. The folios are fourfold in number what they would otherwise have been, and the surplus is worse than useless. I trust that this most inconvenient and embarrassing mode of taking testimony will be corrected by the rules recently adopted on the subject by the Circuit and District Courts.* These observations are

* The following are the Rules referred to :

Circuit Court Rule, November 17th, 1868. On the hearing, in this Court, of an appeal from the District Court, on any record which shall hereafter be transmitted from the District Court, no statement or report found in such record, of any testimony given *viva voce*, in open Court, in the District Court, will be con-

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not intended to apply any more to the present case than to most of the appeals which have come before me for some time past.

The decree below is reversed, and a decree will be entered dismissing the libel.

sidered by this Court as evidence, unless such testimony shall appear, on its face, to have been taken down in the same manner as in jury trials in common law issues, and not *verbatim*, as in depositions *de bene esse*.

District Court Rule, November 17th, 1868. The clerk of this Court, in making up the record to be transmitted to the Circuit Court, on an appeal, in pursuance of Rule No. 53, adopted by the Supreme Court, at the December term, 1854, as one of the rules for regulating proceedings in Admiralty, shall not include in such record, as any portion of the testimony on the part of any party, any statement or report of any testimony given *viva voce* in open Court, unless such testimony shall have been taken down in accordance with Rules 124 and 125 of this Court, and shall have become the true minutes of such testimony, in accordance with Rules 124, 125, 126, and 127 of this Court; and no consent of parties shall be of any avail to dispense with or vary so much of said Rules 124 and 125 as requires such *viva voce* testimony given in open Court, to be taken down in the same manner as in jury trials in common law issues, and not *verbatim*, as in depositions *de bene esse*. Whenever such testimony shall be taken down by the clerk, the legal fees chargeable by him therefor, shall be taxable as part of the costs in the cause.

Rule 124. When either party shall require *viva voce* testimony given in open Court, to be taken down by the clerk, pursuant to the Act of Congress, it shall be taken in the same manner as in jury trials on common law issues, and not *verbatim*, as in depositions *de bene esse*.

Rule 125. The notes of the judge may, by assent of parties, be used as if taken down by the clerk.

Rule 126. Either party desiring to diminish, vary, or enlarge the minutes of proofs taken by the clerk or judge, may, within two days after the trial, serve a statement of proofs on the proctor of the opposite party, and such statement, if assented to, or, if no amendments are proposed thereto, within two days thereafter, by such proctor, shall be regarded the true minutes of the testimony given, and the notes of the judge or clerk be corrected in conformity thereto.

Rule 127. If amendments are proposed, and the parties do not agree therein, the statements and amendments shall be forthwith referred to the judge, and he shall settle or determine how the facts are, and the statement thus settled or adjusted, shall be filed as the true minutes of the testimony given.

The Norwich and New York Transp. Co. v. The Western Massachusetts Ins. Co.

THE NORWICH AND NEW YORK TRANSPORTATION COMPANY

vs.

THE WESTERN MASSACHUSETTS INSURANCE COMPANY.

Where a policy of insurance, against loss or damage by fire to a vessel, contained a provision that the insurers should not be bound to pay until proper proofs of loss had been presented to them, and also a provision that no suit should be brought on the policy until after sixty days from the presentation of such proofs, and the insurers, after notice of a loss, inquired into the circumstances, and then, before the plaintiffs were bound to present proofs of loss, denied all liability under the policy, and refused to pay the loss, on the ground that the loss was the result of a marine, and not of a fire, peril, and no proofs of loss were presented, and a suit was brought on the policy before the expiration of sixty days from such refusal to pay: *Held*, that the insurers had thereby waived the proofs of loss, and also the benefit of the provision in regard to the sixty days.

Where a steam vessel, insured against loss or damage by fire, was damaged by a collision, so that the water rose to her furnaces, and forced the fire out, and she was thereby set on fire, and, after burning for some time, she sank: *Held*, that the insurers were liable, on the policy, only for such loss as naturally and necessarily resulted from the fire.

The rule of damages, in such a case, stated.

(Before NELSON and SHIPMAN, JJ., Connecticut, November 24th, 1868.)

THIS was an action at law, founded upon a policy of insurance against loss or damage by fire. The case was tried before SHIPMAN, J., and a jury, and resulted in a verdict for the plaintiffs. The defendants now moved for a new trial, on the ground of alleged misdirection by the Court, in its charge to the jury. The policy was for \$5,000, and was issued by the defendants. The subject insured was the steamer City of Norwich, owned by the plaintiffs, and running between Norwich, Connecticut, and the city of New York, through Long Island Sound. On the morning of the 18th of April, 1866, while on her regular trip to New York, she met with a disas-

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ter, out of which the claim for indemnity set up in this suit arose.

At the trial, the plaintiffs, after proof of ownership, gave evidence tending to prove, that, on the trip named, the steamer came in collision with a schooner; that the stem of the latter cut her down below the water line on the port side, forward of her boiler, making a large breach in her; that through this breach she commenced taking in water, and was rapidly filling; that, in ten or fifteen minutes after she was struck, a fire broke out on board, caused by the water, which flowed into the breach made by the collision, rising to the furnaces, and blowing the fire out upon the surrounding wood-work, which made rapid progress, and soon enveloped her upper works in flames; that, in half or three-quarters of an hour after, she sank in twenty fathoms of water, going down bow foremost, ending completely over in her descent, and finally resting on the bottom with her keel up; that she was afterward raised, taken to New York, and repaired by the plaintiffs; that she was damaged, in all, to the extent of \$84,000; that, of this amount, \$69,000 was the natural, necessary, and inevitable consequence of the fire; that \$15,000, and no more, was chargeable to the marine disaster; that, though, from the breach caused by the collision, she was rapidly filling with water, yet, but for the fire, she would have settled down only to her promenade deck, and would not have gone to the bottom; that, in this condition, she could easily have been towed to a place of safety, discharged of her water, the breach in her side repaired, for a sum not exceeding \$5,000, and all the rest of the damage repaired, and the boat restored to her former condition, for a sum not exceeding \$10,000 in addition, including towage, but the fire burnt off her light upper works, entirely consuming a portion of them, liberated her light freight, (which was stowed under her promenade deck, on her main deck, and entirely housed in at the sides,) so that it floated off; and that thus her floating capacity was reduced to such an extent that she finally went down. This evidence, tending to prove that the steamer would have floated or

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swum, after and notwithstanding the injury she received by the collision, had no fire intervened, was from the testimony of nautical men, who testified that they were practically acquainted with steamers of this character, and from a civil and mechanical engineer, who testified that he was well versed in his profession, and that he had made full and elaborate estimates of the materials and equipments of the boat and her cargo, upon data submitted to him by the plaintiffs, with special reference to the question, whether, or not, if simply filled with water, she would have sunk to the bottom, or only have settled to her upper or promenade deck, and still have floated or swum. The evidence tending to prove the time when the fire first broke out, the extent of the conflagration before the vessel sank, the length of time she floated after the commencement of the fire, and the other circumstances attending the fire, was mainly from eye-witnesses. There was also evidence to prove that the plaintiffs paid for raising the steamer \$22,500, and that this was the precise value of the wreck, when raised. It was further in proof that it actually cost over \$40,000 to raise the wreck. The plaintiffs also offered evidence to prove that, after the loss, and after the wreck was raised, and in a situation to be examined, she was examined by the defendants before they declined to pay the loss. The defendants offered no testimony on the trial, nor did they take any exceptions to the rulings of the Court on the admission of evidence, except to the following question, put by the plaintiffs to the agent of the wrecking company which raised the sunken steamer: "What did the steamboat company (the plaintiffs) pay you for raising the boat?" To this question the defendants objected. The Court overruled the objection, and admitted the evidence, to which ruling the defendants excepted. The plaintiffs offered evidence to prove the value of the steamer before the collision, to which the defendants objected, and the Court thereupon excluded the evidence.

At the conclusion of the evidence, the defendants requested the Court to charge the jury as follows: (1.) The

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insurance effected in this case was against loss or damage by fire. The insurers took upon themselves no risk whatever, and are not liable for any loss, the efficient cause of which was a marine disaster; (2.) In case of the concurrence of different perils, to one of which it is necessary to attribute the loss, it is to be attributed to the efficient predominating peril, whether it is, or is not, in activity at the consummation of the disaster; (3.) If, therefore, the jury shall find that the fire was simply the result of a marine disaster, and that that disaster, to wit, the collision, was the efficient predominating cause of the loss, then they are to regard the fire simply as incident to the marine disaster, and the insurers against fire alone will not be liable; (4.) If the jury could, in any event, consider the burning as a risk within the terms of the policy, they are bound to return no greater damages than the actual cash value of the steamboat at the time the fire happened; and if the jury shall find that, at the time of the breaking out of the fire, the steamer had received her death wound, and that she would inevitably have perished from the collision, no damages are to be assessed against the defendants, since the fire would add no loss to that which was already total; (5.) The defendants are liable only for damages actually proved to have been caused by the burning. They are not liable for damages done to the steamer in attempts to raise her; and the burden of proof is on the plaintiffs to show, not only that they received some damage from the burning of the steamer, but also the exact amount of that damage, separate and apart from the actual damage done by the collision, and also separate and apart from the damage in various attempts to raise her. If the plaintiffs show no such distinct and definite loss, then they must fail to recover; (6.) In no event can the defendants be liable for the cost of raising the vessel, and the jury are to disregard that wholly in their calculations; (7.) By the terms of the policy, the defendants are not bound to pay, until proper proofs of the loss have been made out and presented. There is no evidence before the jury that any such proofs of loss have ever been presented to the company. The

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plaintiffs rely on a waiver by the defendants of such proofs. A waiver is an intentional abandonment of a known right. In order to find a waiver in this case, the jury must find that the defendants intentionally abandoned all their right to demand proofs of loss. In any event, the defendants would have sixty days after the waiver took effect to pay the loss; and a suit brought within the sixty days is prematurely brought, and cannot be sustained, as a waiver would confer no greater right than would arise under the required proofs; (8.) The rule of damages in the case has been determined by the parties in their contract of insurance. That rule is, the cash value of the subject insured at the time the fire happened; and, the plaintiffs having failed to show what was the cash value of the steamer at such time, the verdict must be for the defendants; (9.) If the jury shall find that the fire was the result of the collision, they must return a verdict for the defendants, because, in such case, the collision would be the efficient and predominating cause of loss.

The Court charged the jury as follows: "The contract upon which this suit is brought is one of indemnity against loss or damage by fire, on the steamer City of Norwich, owned by the plaintiffs. This contract was in force before and at the time of the fire. The plaintiffs claim that they suffered loss by the fire to an amount exceeding the entire insurance on their boat, and that the defendants are liable to them on their policy. The questions for the jury are, whether the plaintiffs' loss was the result of the fire, and, if so, what was the extent of that loss. Before noticing the main fact in controversy, I will dispose of two questions of law raised by the defendants, and which rest upon undisputed facts. The defendants object, (1.) That proofs of loss were not furnished by the plaintiffs, in compliance with the condition to that effect in the policy; (2.) That the suit was brought before any right of action had accrued under the policy, sixty days not having elapsed, after the alleged waiver of proofs. As to the first question, it is true, in fact, that no formal proofs of loss were furnished in accordance with the terms of the condition

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in the policy. But this point need not trouble the jury. The plaintiffs gave the defendants proper and timely notice that the loss had occurred, and the latter, after examining the wreck, and inquiring into the circumstances, and before the plaintiffs were bound to present proofs of loss, denied all liability under the policy, and refused to pay any loss resulting from the disaster, on the ground that it was a loss by a marine, and not by a fire, peril. This denial of all liability whatever by the defendants was, in judgment of law, a waiver of any further proofs of loss. The second objection, that the suit was instituted before any right of action had accrued by the terms of the policy, need not embarrass you. The defendants having denied all liability, and declined to pay, the condition fixing the time within which no suit should be brought, to wit, sixty days after proofs of loss should be furnished, was no longer binding, and the plaintiffs could bring their action at once. The main question for the jury to determine is, whether the loss sustained by the plaintiffs was the result of the fire; in other words, whether the damage they claim was the natural, necessary, and inevitable consequence of the fire. This depends upon the condition of the steamer after she was struck. A short time before the fire broke out, she came in collision with a schooner. The circumstances of the collision are not material here. According to the statement of several witnesses, she was cut through below the water line, immediately began to fill, in ten or fifteen minutes was discovered to be on fire, and, in half or three-quarters of an hour, went to the bottom, ending over as she descended, and resting on the bottom with her keel up. The question is—would she have gone to the bottom but for the fire? This is a vital question; and must be decided by the jury before the plaintiffs can recover. You will say, in view of the evidence, whether she would have gone to the bottom, or only have settled down to her promenade deck, and remained suspended in the water, but for the effect produced by the fire. If she would not have sunk, but only have settled in the water to the promenade deck, except for the effect of the fire in re-

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ducing her floating capacity, the plaintiffs are entitled to recover, not only damage for what was actually consumed, but all the damage which inevitably resulted from the burning. The plaintiffs have offered in evidence the opinions of nautical men acquainted with steamers, and of a civil and mechanical engineer, who testified that he had made a careful computation of the floating capacity of the boat and her contents, upon data submitted to him. These witnesses give it as their opinion, that she would not have sunk below her promenade deck, had not the fire consumed a portion of her upper works. The question is one of fact for the jury. If they find, upon the evidence, that the boat would have continued to float, so that she could have been towed to a place of safety had the fire not occurred, they will find a verdict for the plaintiffs. But, as I have already intimated, if you find she would have sunk to the bottom from the effects of the collision, and without the intervention of the fire, the plaintiffs cannot recover. The remaining questions relate to the damages. You must distinguish between the damage resulting from the collision and that resulting from the fire; and, in estimating the latter, you will take the boat in the condition she was in after the collision, and before the fire had commenced its work. The plaintiffs claim, upon the evidence, that the damage done by the blow of the schooner did not exceed \$5,000. To this they admit should be added a sum not exceeding \$10,000 to get her into port, free her from water, and restore her to as good a condition as she was in before the injury. The calculation is based upon what they claim the evidence shows would have been the state of things had no fire occurred. These two sums, amounting to \$15,000, the plaintiffs insist is the extent of the damage resulting from the marine disaster. The plaintiffs also claim that the whole damage done by the collision and fire was \$84,000. Deducting the \$15,000, as chargeable to the marine disaster, there remains \$69,000, as directly chargeable to the fire. On the accuracy of these claims you are to decide, upon the evidence before you. If the defendants are liable at all, they are liable for one-fifteenth

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of the loss which the plaintiffs suffered from the fire. To repeat what I have already said: If the steamer would have sunk to the bottom had no fire broken out, the plaintiffs cannot recover. On the contrary, if she would have settled only to her promenade deck, the defendants are liable for one-fifteenth of the damage. The mode in which the damages should be estimated has occupied my attention. You will remember that the Court excluded evidence of the value of the steamer before the collision took place, upon objection being made by the defendants' counsel, as her condition the moment the fire took place is the one to be considered. The plaintiffs' estimate of the damage is based upon the cost of repairing her and restoring her to her former condition, exclusive of the amount they admit as properly chargeable to the collision. You will determine, upon the evidence, whether, in your judgment, the repairs that were put upon her enhanced her value beyond her cash value before the commencement of the fire. If they did, you will deduct from the damage you find proved a sum equal to such increase of value. If, on the other hand, you find that her restoration was only to her former condition, and did not enhance her value beyond what it was when the fire commenced its work, you will, if you find for the plaintiffs, give one-fifteenth of the cost of restoring her to the condition she was in when the fire took place.

"Where I have not charged you in conformity with the requests of the defendants, they may consider their requests denied."

Charles Chapman, James A. Hovey and Jeremiah Halsey, for the plaintiffs.

John T. Wait, Townsend Scudder and George Pratt, for the defendants.

SHIPMAN, J. The disputed facts, in this case, lie within a very limited range, and were all distinctly submitted to the

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jury. The only matter now for consideration is, whether the Court correctly instructed the jury on the questions of law applicable to the facts.

1. As to the waiver of proofs of loss. This point was raised on the trial, and, although not insisted on upon the argument of the motion, we will notice it here. It is conceded, that there were no formal proofs presented to the defendants, as provided for in the policy. But the written admission of the defendants, produced on the trial, conclusively proves, that the plaintiffs gave the defendants timely and proper notice that the loss had occurred, and that the latter, after examining the wreck, and inquiring into the circumstances, denied all liability under the policy, on the ground that the loss was the result of a marine, and not of a fire, peril. This was all done before the time within which the plaintiffs were, by the terms of the policy, bound to present the formal proofs, had expired. The Court charged the jury, that this denial of all liability whatever, by the defendants, was, in judgment of law, a waiver of any further proofs of loss. On this point, the authorities are numerous and decisive, and fully sustain the rule laid down by the Court. The denial, by the defendants, of all liability in the case, expressly conceded that there was a loss, and was a notice to the plaintiffs that they would not be bound, in any event, though formal proofs were furnished. The presentation of proofs, under such circumstances, was of no importance to either party, and the law rarely, if ever, requires the observance of an idle formality, especially after the party for whose benefit the original stipulation was made, has rendered conformity thereto unnecessary, and practically superfluous. (*Schenck v. The Mercer County Mut. Fire Ins. Co.*, 4 Zab., 447; *Allegre v. The Maryland Ins. Co.*, 6 Har. & Johns., 408; *McMasters v. The Westchester County Mutual Ins. Co.*, 25 Wend. 379; *Francis v. The Ocean Ins. Co.*, 6 Cow., 404; *Tayloe v. The Merchants' Fire Ins. Co.*, 9 How., 390; *O'Niel v. The Buffalo Fire Ins. Co.*, 3 Comst., 122; *The Maryland Ins. Co. v. Bathurst*, 5 Gill & Johns., 159; *Graves v. The Washington Marine Ins. Co.*, 12 Allen, 391.)

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2. There was no error in that part of the charge which instructed the jury that the suit was not prematurely brought. There was a provision in the policy, that the loss should be payable after sixty days from notice and the furnishing of preliminary proofs of loss to the underwriters. If the matter had gone through the formal stages provided for in the policy, and the proofs had been made, without any denial of all liability on another ground, no suit could have been sustained on the policy, until the sixty days had expired. This clause was for the protection, or convenience, of the underwriters; but, when they waived the preliminary proofs, they also waived the benefit of this stipulation, and rendered it nugatory. It would be absurd to say that they still retained the right to have sixty days within which to pay a loss, which they had declared they would not pay at any time, or under any circumstances. (*The Columbian Ins. Co. v. Catlett*, 12 *Wheat.*, 383; *Allegre v. The Maryland Ins. Co.*, 6 *Har. & Johns.*, 408; *Phillips v. The Protection Ins. Co.*, 14 *Missouri*, 220.)

3. We discover no error in that part of the charge in which the Court submitted to the jury the question, whether or not the proximate cause of the loss for which a recovery was sought, was to be found in the fire which followed the collision. There was little or no controversy about the facts which characterized the disaster, up to the time the fire broke out. The boat was struck on her port side, forward of her wheel house, and her hull was stove in below the water line. She immediately began to fill, and, in ten or fifteen minutes after the collision, the water rose to her furnaces, and forced the fire out upon the wood-work. It made rapid progress, and soon enveloped her in flames. She continued to float for half or three-quarters of an hour, and until a considerable portion of her upper works was consumed, when she went down, bow foremost, ending completely over, and resting on the bottom, keel up, in about twenty fathoms of water. Up to the time the fire broke out, all the damage the boat had received was the wound in her side, and the injury resultin

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from the water, which rushed in. And here an important question of fact arose, and that was, whether the consequences resulting from the collision alone, without the intervention of the fire, would have gone beyond her filling, and settling in the water to her promenade deck, and there remaining suspended in the water, until she could be towed to a place of safety, her side be repaired, and the whole boat be restored to her former condition. The uncontradicted evidence was, that, had she so remained, suspended in the water, she could easily have been towed to a place of safety, her wound repaired, and every part of the boat, including her furniture, which would have been injured by the water, restored to the condition it was in before the collision, for a sum not exceeding \$15,000. The actual loss proved, however, was about \$84,000. On this point, there was no conflicting evidence. The difference between these sums is \$69,000, and this latter sum was claimed by the plaintiffs to be the amount of their loss naturally and necessarily resulting from the fire, and which, but for the fire, would not have happened. They offered evidence to show that, from the predominance of the floating over the sinking materials, in her structure and cargo, in connection with the fact that she was so housed in, from stem to stern, between her main and her upper or promenade deck, that her cargo would have been kept in its place, although immersed in water, her sinking was impossible, as a result of the collision merely. They also offered the testimony of eye-witnesses of the conflagration, to prove that she did actually float for half or three-quarters of an hour, and that it was not till her upper works were all on fire, and nearly consumed, by which her light freight was liberated, and enabled to float away, and her floating capacity thus greatly reduced, that she finally sank. To overcome this evidence, no proof was offered by the defendants. The Court instructed the jury, that the contract upon which the plaintiffs sought to recover, was one of indemnity against loss by fire only, and that, therefore, whether her sinking was the natural and necessary result of the fire, became a vital question; and that, if the jury

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found this question in the negative, the plaintiffs could not recover. This instruction was more favorable to the defendants than they had a right to demand, for it was conceded, that a considerable portion of the steamer's upper works was actually consumed. The other injuries resulting after the fire broke out, for which the plaintiffs sought to recover, were occasioned by her sinking to the bottom. But, in order to simplify the question to the jury, they were instructed, that, if they found the boat would have finally sunk, had no fire broken out, their verdict must be for the defendants. They must, therefore, have found, by their verdict, that she would not have sunk, but for the fire, and, consequently, that all the damage which naturally resulted from the marine injury, was \$15,000, and that all the rest was the natural and necessary result of the fire. This part of the charge may not have been couched in the formal and technical language of the text-writers on this branch of the law, but it distinctly presented the question, as to the proximate cause of the loss for which a recovery was claimed. The effect of the verdict, therefore, is to bring the case within the scope of the sound proposition, (*Phillips on Insurance*, vol. 1, subsection 1136, p. 679, 5th ed.,) that "in case of the concurrence of two causes of loss, one at the risk of the assured, and the other insured against, or one insured against by A, and the other by B, if the damage by the perils respectively can be discriminated, each party must bear his proportion." In the case before us this was clearly done. The loss resulting from the fire was distinctly separated, by the evidence, from any loss resulting from the collision, and the jury were instructed that the plaintiffs could recover only for such loss as naturally and necessarily resulted from the former element. There was no conflict of evidence on this point, and the jury found no damages, except such as were chargeable to fire, as the proximate cause. It is well settled, by numerous authorities, that the proximate cause of loss is to be looked to. This rule prevails in both fire and marine insurance. (Jewett, J., in *Gates v. The Madison County Mut. Ins. Co.*, 1 *Selden*, 469, 478, and cases there cited.)

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4. The rule of damages was correctly stated, under the circumstances. The rule prescribed by the policy was the cash value of the boat just before the fire. The offer was made by the plaintiffs to prove her cash value, deducting the amount she was damaged by the collision, including all necessary consequences. To this mode the defendants objected, and the only other mode was, to ascertain what it cost to repair the damages necessarily resulting from the fire. The jury were instructed that, if the cost of the repairs exceeded the fire damage, and rendered the boat more valuable, they should deduct the excess. Under the instructions, the plaintiffs could obtain no more than indemnity for the loss by fire. This they were entitled to.

5. The objection to the allowance of \$22,500 for raising the wreck is untenable. This was found to be the precise value of the wreck when recovered. It was in proof that it cost over \$40,000 to raise it, but no more was allowed than the value of the same when raised. So much was saved from an otherwise total loss, and, as the defendants had the benefit of it, in the adjustment of the damages, they are chargeable with the necessary and reasonable cost of saving it.

A new trial is, therefore, denied, on all the grounds.

In re WARD E. ROBINSON, A BANKRUPT.

A judgment which, by § 33 of the bankruptcy Act of March 2d, 1867, (14 *U. S. Stat. at Large*, 533,) will not be discharged by a discharge, because it is a debt created by the fraud of the bankrupt, is not, when proved in bankruptcy, subject to the provisions of the first clause of § 21 of that Act, in regard to judgments on debts proved being deemed to be discharged.

A record of a State Court, which sets forth proceedings warranted by the law of that State, is entitled to verity, although not formal in some particulars. This Court refused to review an incidental question of practice in a bankruptcy proceeding in the District Court.

(Before NELSON, J., Southern District of New York, November 30th, 1868.)

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THIS was a petition for a review of an order made by the District Court refusing to discharge the bankrupt from arrest, and also refusing to direct satisfaction to be entered, of a judgment obtained in the Court of Common Pleas of the city and county of New York, against him, by Ann Walter, for \$154.60, May 25th, 1868. The petition in bankruptcy was filed on the 30th of May, 1868.

Thomas A. Jenckes and Francis C. Nye, for the bankrupt.

Samuel Boardman, for Ann Walter.

NELSON, J. This application for the discharge from the arrest, and for satisfaction of the judgment, is founded upon the 21st section of the bankruptcy Act, which provides, "that no creditor, proving his debt or claim, shall be allowed to maintain any suit at law, or in equity, therefor, against the bankrupt, but shall be deemed to have waived all right of action and suit against the bankrupt; and all proceedings already commenced, or unsatisfied judgments already obtained thereon, shall be deemed to be discharged and surrendered thereby." Ann Walter has proved her debt or judgment in the present bankruptcy proceedings; and, upon the words of this section, there would seem to be an end of the case. The same section further provides, that "no creditor whose debt is provable under this Act shall be allowed to prosecute to final judgment any suit at law, or in equity, therefor, against the bankrupt, until the question of the debtor's discharge shall have been determined; and any such suit or proceedings shall, upon the application of the bankrupt, be stayed, to await the determination of the Court in bankruptcy on the question of the discharge." It will thus be seen, that a manifest distinction is made between a creditor who has proved his debt and one who holds a provable debt. The reason for the distinction is not as manifest. The judgment of Ann Walter is claimed to be founded upon a debt created by the fraud of the bankrupt. If this be so, then, according

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to the 33d section of that Act, the discharge, if obtained by the bankrupt, will not affect it. Such a debt is expressly excepted from the operation of the discharge. The same section provides that, notwithstanding this, the creditor may come in, prove his debt, and take his dividend. Now, Ann Walter, having proved her judgment, as thus authorized, would find that judgment, taking the 21st section literally, "discharged and surrendered," notwithstanding the 33d section provides expressly that, if the debt was created by fraud, the discharge under the Act shall not affect it. I think that no such intent or meaning can be reasonably imputed to the law-makers, and that, therefore, the 33d section must be regarded as, at least, taking a debt of this character out of the operation of the first clause of the 21st section. Hence, the judgment in question is not "discharged or surrendered," nor is the bankrupt entitled to be released from the arrest, or his bail from liability on the bail bond, if the debt was one created by fraud.

The District Court held, that the proceedings and judgment in the Court of Common Pleas, the record of which was produced before that Court, imported on their face, according to the practice and course of proceeding in that Court under the New York law, that the suit was one to recover a debt created by the fraud of the debtor, and decided that it would not go behind that record, to call in question its verity. I concur in this view. It was argued, on behalf of the bankrupt, that it should appear from the record itself, that is, from the declaration in the case, that the suit in the Court of Common Pleas proceeded in that Court on the ground of fraud. But, the question is one of practice, rather than of principle. The mode of proceeding in the Court of Common Pleas, in a case where the debt is claimed to have been created by the fraud and deceit of the debtor, may be peculiar, and may differ from the practice in the Courts of other States; but, it is understood to be warranted by the New York law, and, if so, the record is entitled to as much verity, as if the proceeding were more formal and specific.

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The last clause of the 26th section of the Act was referred to on the argument, but I do not see that it has any application to the case.

The other question raised and urged, namely, as to the force and effect of the order to show cause before the register why the discharge should not be granted, is so much a question of practice, that I am not inclined to interfere with the judgment of the Court below in the matter. The complaint is, that the register postponed the day for the creditors to come in and show cause. Any abuse by the register in this matter will be corrected by the Court below, which has power to supervise this proceeding.

AUGUSTIN DALY

vs.

HENRY D. PALMER AND HENRY C. JARRETT. IN EQUITY.

What is meant by the provision in the copyright Act of August 18th, 1856, (11 *U. S. Stat. at Large*, 138,) which confers on the author or proprietor of a copyrighted dramatic composition, designed or suited for public representation, along with the sole right to print and publish it, the sole right to act, perform or represent it on a stage or public place, defined.

A written play, consisting of directions for its representation by action, without the use of spoken language by the characters, is a dramatic composition, within that Act.

The question of infringement of a copyrighted dramatic composition, considered.

The case of *D'Almaine v. Boosey*, (1 *Younge & Collyer's Exch. R.*, 288,) cited and applied.

Under the Act of 1856, the author of a copyrighted dramatic composition is entitled to be protected against piracy, in whole or in part, by representation.

Where all that was substantial and material in a scene of a copyrighted play, a great part of such scene being represented by actions and not by spoken language, was used in the same order and sequence of events, and in a manner to convey the same sensations and impressions to those who saw it represented: *Held*, that there was an infringement.

The true test of piracy, in respect to a copyright, defined.

Daly v. Palmer.

The sale of an infringing play to another, with a view to its public representation, makes the seller a participant in causing the play to be publicly represented.

(Before BLATCHFORD, J., Southern District of New York, December 15th, 1868.)

THIS was an application for a provisional injunction to restrain the defendants from the public performance and representation, and from the sale for dramatic representation, of a scene called the "railroad scene," in a play called "After Dark."

Thomas S. Alexander, William Tracy, and Joseph F. Daly, for the plaintiff.

William D. Booth and Thomas W. Clarke, (of Boston,) for the defendants.

BLATCHFORD, J. The plaintiff is, by profession, a dramatic author, his business being to compose, write, and produce on the theatrical stage, dramatic compositions, commonly called plays. The defendants are the managers of a public place of theatrical amusement in the city of New York, called Niblo's Garden. Before the 1st of August, 1867, the plaintiff composed and wrote a dramatic composition called "Under the Gaslight," and on that day he took the proper steps to secure to himself a copyright for the composition, under the provisions of the Act of February 3d, 1831, (4 *U. S. Stat. at Large*, 436,) by depositing before publication, a printed copy of the title of the composition, as author and proprietor, in the clerk's office of the District Court of the Southern District of New York, where he resided at the time. The composition was afterward printed and published, and, within three months from its publication, he caused a copy of it, as printed and published, to be delivered to said clerk. He also gave information of copyright being secured, by causing to be printed and inserted in the several copies published, the words prescribed by the 5th section of the Act.

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The Act of 1831 confers upon the author and proprietor of a dramatic composition, duly copyrighted, the sole right and liberty of printing, reprinting, publishing, and vending such composition, in whole or in part, for the term of twenty-eight years from the time of recording the title of such composition in the manner directed by the Act. The Act of August 18th, 1856, (11 *U. S. Stat. at Large*, 138,) provides, that any copyright thereafter granted under the laws of the United States, "to the author or proprietor of any dramatic composition, designed or suited for public representation, shall be deemed and taken to confer upon the said author or proprietor, his heirs and assigns, along with the sole right to print and publish the said composition, the sole right also to act, perform, or represent the same, or cause it to be acted, performed, or represented, on any stage or public place, during the whole period for which the copyright is obtained."

The bill alleges that the plaintiff's play was designed and suited for public representation; that it was represented for the first time on the 12th of August, 1867, under his direction and for his benefit, at the New York Theatre, a public place of theatrical amusement in New York, and was thenceforward represented there for eight consecutive weeks; that it met with great success, attracted crowds of persons, and was pecuniarily profitable to the plaintiff to a large amount; that the particular cause of such success was what was commonly called, after such public performance, the "railroad scene," at the end of the third scene of the fourth act, in which one of the characters is represented as secured by another, and laid helpless upon the rails of a railroad track, in such manner, and with the presumed intent, that the railroad train, momentarily expected, shall run him down and kill him, and, just at the moment when such a fate seems inevitable, another of the characters contrives to reach the intended victim, and to drag him from the track as the train rushes in and passes over the spot; that this incident and scene was entirely novel, and unlike any dramatic incident known to have been theretofore represented on any stage, or invented by any author before

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the plaintiff so composed, produced, and represented the same; that the playing of said composition and scene caused the same to become famous in all parts of the United States and Canada, and in England; that the chief value of the composition and its popularity depend upon said "railroad scene;" that it was repeatedly produced and represented by and for the advantage of the plaintiff, in many cities and towns of the United States and Canada, to the profit of the plaintiff; that, before learning of the alleged wrongs mentioned in the bill attempted by the defendants, the plaintiff had made arrangements for representing the play dramatically at New York, and in various places in the United States, during the present winter and the approaching spring; that he accordingly commenced to represent the play at the New York Theatre, in the city of New York, on the 4th of November, 1868; that, soon after the production, representation, and printing of the play in the United States, one Dion Boucicault, a dramatic author and actor and theatrical manager, a subject of Great Britain, residing in England, procured a copy of said play by some means, and, without the knowledge or consent of the plaintiff, prepared therefrom a play, which he called "After Dark," in which play he introduced several of the scenes and incidents of the plaintiff's play, varying them slightly, but following in them the invention and plan of the plaintiff's play, in a manner which was intended to differ from it only slightly, so as colorably to be a different work, while substantially retaining the attractive features of the plaintiff's play, and which contained, with only colorable variations, the said "railroad scene," of the plaintiff's play, substituting for the surface railroad an underground railroad, for the rescuer of the victim to be killed on the railroad a man for a woman, for the railroad station in which the rescuer was confined a cellar, and for the breaking down a door to escape and rescue the victim the breaking down a wall or the door in a wall; that the work of Boucicault is a palpable imitation of the plaintiff's said "railroad scene," and is plagiarized therefrom, and put into the play called "After Dark," by Boucicault, for the

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purpose of obtaining the pecuniary benefit which might otherwise result to the plaintiff from the representation of his play; that the play of "After Dark" was performed in England without the plaintiff's consent, to the great profit of Boucicault, and was indebted for its success and profit to such imitation of said "railroad scene;" that Boucicault has sent copies of his play, containing such plagiarism of said "railroad scene" to the defendants in the United States, for sale and performance for his own profit, and several copies of it are in the defendants' possession; that the defendants are intending and have announced their purpose, to perform such play called "After Dark," publicly on the stage, at Niblo's Garden, in New York, on the 16th of November, 1868, and every night thereafter, till further notice, without the consent of the plaintiff; that such play, and the plagiarism of said "railroad scene" are being rehearsed at Niblo's Garden, under the direction of the defendants, with a view to such public performance thereof; and that the defendant Palmer, acting for Boucicault, is about to sell copies of the play called "After Dark," with said plagiarized scene, to other persons in the United States, to be publicly represented. The bill prays for an injunction to restrain the defendants from the public representation, and from the sale for dramatic representation, of the said "railroad scene" in "After Dark."

The defence to the application, on the facts, is confined to showing, by affidavits, that the following matters were known prior to the taking out by the plaintiff of his copyright, namely, the representation on a stage of a train of cars drawn by a locomotive engine on a railroad; a like representation wherein the train appeared to run over a man lying on the track; and a like representation wherein the train appeared to run over a man lying on the track, who had been thrown thereon in a helpless condition by another of the characters, in order that he might be run over and killed. A story called "Captain Tom's Fright," in "The Galaxy" for March 15th, 1867, is also adduced to affect the validity of the plaintiff's copyright. There is no answer to the bill, nor is there any

denial of the allegations that Boucicault procured a copy of the plaintiff's play and prepared therefrom the "railroad scene" in the play of "After Dark," and intended that the latter should only be colorably different from the "railroad scene" in the plaintiff's play, by making the substitutions before mentioned, and that the "railroad scene," in the play of "After Dark," was plagiarized by Boucicault from the "railroad scene" in the plaintiff's play.

In the plaintiff's play, there is a surface railroad, with a railroad station, and a signal-station shed, or store-room. A signal man appears, and a woman named Laura. At the request of Laura, the signal man locks her in the shed. There are some axes in it. One Snorkey then appears. The signal man then goes off. One Byke then enters, with a coil of rope in his hand, and throws it over Snorkey, and tightens it around his arm, and coils it around his legs, and then lays him across the track and fastens him to the rails, and goes off, having, by language, given it to be understood that the intention is that Snorkey shall be run over by the train and killed. Laura, from a window in the shed, sees what is done. The steam whistle of the train is heard. She takes an axe and strikes the door. The whistle is heard again, with the rumble of the approaching train. She gives more blows on the door with the axe, it opens, she runs and unfastens Snorkey, the lights of the engine appear, and she moves Snorkey's head from the track as the train rushes past. This incident occupies the whole of the third scene of the fourth act. There is a good deal of conversation, first, between the signal man and Laura, and then between Snorkey and the signal man, and then between Byke and Snorkey, and then between Laura and Snorkey. There are stage directions for Laura to go into the shed, for the signal man to lock her in, for Snorkey to enter, for the signal man to go off, for Byke to enter with the coil of rope, for Byke to throw the coil over Snorkey, and tighten the rope around Snorkey's arm and coil it around his legs, for Byke to lay Snorkey across the track, and fasten him to the rails, for Byke to go off, for the steam whis-

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tle to be heard, for blows at the door to be heard, for the steam whistle to be heard again, with the rumble of the train, for more blows on the door to be heard, for the door to open, for Laura to appear with the axe in her hand, for her to run and unfasten Snorkey, for the lights of the engine to be seen, for Laura to take Snorkey's head from the track, and for the train to rush past. These stage directions are separate and apart from the conversation, and are in italics and in parentheses, at the appropriate places in the progress of the scene. The substance and purport of the successive conversations in the scene are, that Laura requests the signal man to lock her in the shed, and he consents, that Snorkey requests the signal man to stop by signal the expected train, and he refuses, that Byke gives Snorkey to understand that he is to be run over and killed by the train, and that Snorkey requests Laura to break down the door and release him. The idea is also conveyed, by the language in the scene, that Byke is about to commit robbery and murder at Laura's house, and that Snorkey is trying to give information of the fact.

In the play of "After Dark," the "railroad scene" is in the third act. In the first scene of that act, one Gordon Chumley is rendered insensible by drugs, and one Old Tom is thrown by force into a wine vault. In the second scene of that act, Old Tom is represented as in the vault. There is an orifice in the vault, which opens upon the track of an underground railroad. The rumbling of cars is heard, and lights flash through the orifice. Old Tom, through a door into an adjoining vault, sees two of the characters carry Chumley, and break a hole through a wall, and pass the body of Chumley through the hole, for concealment, as he supposes, in a well or vault. Old Tom then finds an iron bar, and resolves to attempt escape, by enlarging the orifice in the wall opening on the railroad. Then follows scene third. The railroad is seen, with a circular orifice which ventilates the cellar in which Old Tom is. The body of Chumley is seen lying across the rails, and the arm of Old Tom, and then his head, are passed through the orifice. For this much of the scene

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there are only stage directions, without spoken words. The following is a verbatim copy of the rest of the scene, the parts in parentheses being stage directions: "*Old Tom*. About four courses of bricks will leave one room to pass. What is that on the line? There is something, surely, there. (A distant telegraph alarm rings. The semaphore levers play, and the lamps revolve.) Great Heaven! 'tis Gordon. I see his pale upturned face—he lives! Gordon! Gordon! I'm here. He does not answer me. (A whistle is heard, and distant train passes.) Ah! murderers. I see their plan. They have dragged his insensible body to that place, and left him there to be killed by a passing train. Demons! Wretches! (He works madly at the orifice. The bricks fall under his blows. The orifice increases. He tries to struggle through it.) Not yet. Not yet. (The alarm rings again. The levers in the front play. The red light burns, and a white light is turned to L. H. tunnel. The wheels of an approaching train are heard.) Oh, heaven! give me strength—down—down. One moment! (A large piece of wall falls in, and Old Tom comes with it.) See, it comes, the monster comes. (A loud rumbling and crashing sound is heard. He tries to move Gordon, but seeing the locomotive close on him, he flings himself on the body, and, clasping it in his arms, rolls over with it forward. A locomotive, followed by a train of carriages, rushes over the place, and, as it disappears, Old Tom frees himself from Chumley, and gazes after the train.)" The play of "*After Dark*" has never been published by Boucicault, although printed by him for private use.

The first inquiry is, what is meant, in the Act of 1856, by a "dramatic composition," what is meant by the "public representation" of a dramatic composition, and what is meant by the right to "act, perform, or represent" a dramatic composition, on a "stage or public place." The Act of 1856 confers on the author or proprietor of a copyrighted "dramatic composition, designed or suited for public representation," the sole right of acting, performing, or representing the same on a stage or public place, in addition to the sole right to print

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and publish such composition. The latter right must be considered as being conferred by the Act of 1831, for, although that Act only speaks of a copyright for a "book or books, map, chart, musical composition, print, cut, or engraving," yet, under the language of the Act of 1856, a "dramatic composition, designed or suited for public representation," must be regarded as embraced within the Act of 1831.

A composition, in the sense in which that word is used in the Act of 1856, is a written or literary work invented and set in order. A dramatic composition is such a work in which the narrative is not related, but is represented by dialogue and action. When a dramatic composition is represented, in dialogue and action, by persons who represent it as real, by performing or going through with the various parts or characters assigned to them severally, the composition is acted, performed, or represented; and, if the representation is in public, it is a public representation. To act, in the sense of the statute, is to represent as real, by countenance, voice, or gesture, that which is not real. A character in a play who goes through with a series of events on the stage without speaking, if such be his part in the play, is none the less an actor in it than one who, in addition to motions and gestures, uses his voice. A pantomime is a species of theatrical entertainment, in which the whole action is represented by gesticulation, without the use of words. A written work, consisting wholly of directions, set in order for conveying the ideas of the author on a stage or public place, by means of characters who represent the narrative wholly by action, is as much a dramatic composition designed or suited for public representation, as if language or dialogue were used in it to convey some of the ideas. The "railroad scene," in the plaintiff's play, is undoubtedly a dramatic composition. Those parts of it represented by motion or gesture, without language, are quite as much a dramatic composition, as those parts of it which are represented by voice. This is true, also, of the "railroad scene" in "After Dark." Indeed, on an analysis of the two scenes in the two plays, it is manifest that the most interest-

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ing and attractive dramatic effect in each is produced by what is done by movement and gesture, entirely irrespective of any thing that is spoken. The important dramatic effect, in both plays, is produced by the movements and gestures which are prescribed, and set in order, so as to be read, and which are contained within parentheses. The spoken words in each are of but trifling consequence to the progress of the series of events represented and communicated to the intelligence of the spectator, by those parts of the scene which are directed to be represented by movement and gesture. The series of events so represented, and communicated by movement and gesture alone to the intelligence of the spectator, according to the directions contained in parentheses, in the two plays in question here, embraces the confinement of A. in a receptacle from which there seems to be no feasible means of egress; a railroad track, with the body of B. placed across it, in such manner as to involve the apparently certain destruction of his life by a passing train; the appearance of A. at an opening in the receptacle, from which A. can see the body of B.; audible indications that the train is approaching; successful efforts by A., from within the receptacle, by means of an implement found within it, to obtain egress from it upon the track; and the moving of the body of B., by A., from the impending danger, a moment before the train rushes by. In both of the plays, the idea is conveyed that B. is placed intentionally on the track, with the purpose of having him killed. Such idea is, in the plaintiff's play, conveyed by the joint medium of language uttered, and of movements which are the result of prescribed directions, while, in Boucicault's play, it is conveyed solely by language uttered. The action, the narrative, the dramatic effect and impression, and the series of events in the two scenes, are identical. Both are dramatic compositions, designed, or suited, for public representation. It is true that, in one, A. is a woman, and, in the other, A. is a man; that, in one, A. is confined in a surface railroad station shed, and, in the other, A. is confined in a cellar abutting on the track; that, in one, A. uses an axe, and, in the other, A.

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uses an iron bar; that, in one, A. breaks down a door, and, in the other, A. enlarges a circular hole; that, in one, B. is conscious, and is fastened to the rails by a rope, and, in the other, B. is insensible, and is not fastened; and that, in one, there is a good deal of dialogue during the scene, and, in the other, only a soliloquy by A., and no dialogue. But the two scenes are identical in substance, as written dramatic compositions, in the particulars in which the plaintiff alleges that what he has invented, and set in order, in the scene, has been appropriated by Boucicault.

Nor is this a case of first impression. An arrangement of musical notes, forming a tune or air, is a musical composition; and the author who has invented it, and set it in order, and copyrighted it, is entitled to protection. The extent of that protection has been the subject of judicial interpretation. In the case of *D'Almaine v. Boosey*, (1 *Younge & Collyer's Exch. R.*, 288,) the plaintiffs, proprietors of the copyright of an opera of Auber's, and also of another copyright of the overture of the same opera, and also of another copyright of the airs of the same opera, filed a bill in equity to restrain the defendant from infringing such copyrights. The defendant had published several of the airs, with some alterations, in the shape of quadrilles and waltzes. It was claimed, on the part of the defendant, that his work was merely an adaptation of the original, and, therefore, not a piracy. But the Court (Lord Chief Baron Lyndhurst) held, that if the defendant had published the original air, though with adaptations and harmonies, or for different instruments, it was a piracy, and that it was not like the case of an abridgment of a book, where the purpose of the abridgment was distinct from that of the work from which it was taken. On this subject, the Court says: "It is admitted that the defendant has published portions of the opera containing the melodious parts of it; that he has also published entire airs; and that, in one of his waltzes, he has introduced seventeen bars, in succession, containing the whole of the original air, although he adds fifteen other bars which are not to be found in it. Now, it is said that this is

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not a piracy, first, because the whole of each air has not been taken; and, secondly, because what the plaintiffs purchased was the entire opera, and the opera consists, not merely of certain airs and melodies, but of the whole score. But, in the first place, piracy may be of part of an air, as well as of the whole; and, in the second place, admitting that the opera consists of the whole score, yet, if the plaintiffs were entitled to the whole, *a fortiori*, they were entitled to publish the melodies which form a part. Again, it is said that the present publication is adapted for dancing only, and that some degree of art is needed for the purpose of so adapting it, and that but a small part of the merit belongs to the original composer. That is a nice question. It is a nice question what shall be deemed such a modification of an original work as shall absorb the merit of the original in the new composition. No doubt such a modification may be allowed in some cases, as in that of an abridgment or a digest. Such publications are, in their nature, original. Their compiler intends to make of them a new use, and not that which the author proposed to make. Digests are of great use to practical men, though not so, comparatively speaking, to students. The same may be said of an abridgment of any study; but it must be a *bonâ fide* abridgment, because, if it contains many chapters of the original work, or such as made that work most saleable, the maker of the abridgment commits a piracy. Now, it will be said, that one author may treat the subject very differently from another who wrote before him. That observation is true in many cases. A man may write upon morals in a manner quite distinct from that of others who preceded him; but the subject of music is to be regarded upon very different principles. It is the air or melody which is the invention of the author, and which may, in such case, be the subject of piracy; and you commit a piracy, if, by taking, not a single bar, but several, you incorporate in the new work that in which the whole meritorious part of the invention consists.

* * Now, it appears to me, that if you take from the com-

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position of an author all those bars consecutively which form the entire air or melody, without any material alteration, it is a piracy ; though, on the other hand, you might take them in a different order, or broken by the intersection of others, like words, in such a manner as should not be a piracy. It must depend on whether the air taken is substantially the same with the original. Now, the most unlettered in music can distinguish one song from another, and the mere adaptation of the air, either by changing it to a dance, or by transferring it from one instrument to another, does not, even to common apprehensions, alter the original subject. The ear tells you that it is the same. The original air requires the aid of genius for its construction, but a mere mechanic in music can make the adaptation or accompaniment. Substantially, the piracy is, where the appropriated music, though adapted to a different purpose from that of the original, may still be recognized by the ear. The adding variations makes no difference in the principle." An injunction was granted. The views of Lord Lyndhurst, in that case, were cited and approved by Mr. Justice Nelson, in this Court, in the case of *Jollie v. Jaques*, (1 *Blatchf. C. C. R.* 618, 625.) They are eminently sound and just, and are applicable to the case of a dramatic composition designed for public representation. Such a composition, when represented, excites emotions and imparts impressions not merely through the medium of the ear, as music does, but through the medium of the eye as well as the ear. Movement, gesture, and facial expression, which address the eye only, are as much a part of the dramatic composition as is the spoken language which addresses the ear only ; and that part of the written composition which gives direction for the movement and gesture, is as much a part of the composition, and protected by the copyright, as is the language prescribed to be uttered by the characters. And this is entirely irrespective of the set of the stage, or of the machinery or mechanical appliances, or of what is called, in the language of the stage, scenery, or the work of the scene-painter.

Now, in consonance with the principles laid down by

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Lord Lyndhurst, the plaintiff is as much entitled to protection in respect of a substantial and material original part of his "railroad scene" as he is in respect of the whole. Under the Act of 1856, construed in connection with the Act of 1831, he is entitled to be protected against piracy, in whole or in part, by representation as well as by printing, publishing, and vending. Although the Act of 1831, in regard to printing, publishing, and vending, uses the words "in whole or in part," and the Act of 1856, in regard to representing, does not use those words, yet the Act of 1856, by referring, as it does, to the right conferred by the Act of 1831, as the "sole right to print and publish" the copyrighted composition, when such right is, on the face of the Act of 1831, the sole right to print and publish "in whole or in part," and by then conferring "the sole right also to act, perform, or represent the same, or cause it to be acted, performed, or represented, on any stage or public place," must be held to confer the right to represent in whole or in part. All that is substantial and material in the plaintiff's "railroad scene" has been used by Boucicault, in the same order and sequence of events, and in a manner to convey the same sensations and impressions to those who see it represented, as in the plaintiff's play. Boucicault has, indeed, adapted the plaintiff's series of events to the story of his play, and, in doing so, has evinced skill and art; but the same use is made, in both plays, of the same series of events, to excite, by representation, the same emotions, in the same sequence. There is no new use, in the sense of the law, in Boucicault's play, of what is found in the plaintiff's "railroad scene." The "railroad scene" in Boucicault's play contains everything which makes the "railroad scene" in the plaintiff's play attractive, as a representation on the stage. As, in the case of the musical composition, the air is the invention of the author, and a piracy is committed if that in which the whole meritorious part of the invention consists is incorporated in another work, without any material alteration in sequence of bars, so, in the case of the dramatic composition, designed or suited for rep-

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resentation, the series of events directed in writing by the author, in any particular scene, is his invention, and a piracy is committed if that in which the whole merit of the scene consists, is incorporated in another work, without any material alteration in the constituent parts of the series of events, or in the sequence of the events in the series. The adaptation of such series of events to different characters who use different language from the characters and language in the first play, is like the adaptation of the musical air to a different instrument, or the addition to it of variations or of an accompaniment. The original subject of invention, that which required genius to construct it and set it in order, remains the same, in the adaptation. A mere mechanic in dramatic composition can make such adaptation, and it is a piracy, if the appropriated series of events, when represented on the stage, although performed by new and different characters, using different language, is recognized by the spectator, through any of the senses to which the representation is addressed, as conveying substantially the same impressions to, and exciting the same emotions in, the mind, in the same sequence or order. Tested by these principles, the "railroad scene" in Boucicault's play, is, undoubtedly, when acted, performed, or represented on a stage or public place, an invasion and infringement of the copyright of the plaintiff in the "railroad scene" in his play.

The substantial identity between the two scenes would naturally lead to the conclusion, that the later one had been adapted from the earlier one. The charge of actual plagiarism on the part of Boucicault, made in the bill, is not denied. It is hardly possible that the resemblances are accidental, and that the differences are not merely colorable, with a view to disguise the plagiarism. The true test of whether there is piracy or not, is to ascertain whether there is a servile or evasive imitation of the plaintiff's work, or whether there is a *bonâ fide* original compilation, made up from common materials, and common sources, with resemblances which are merely accidental, or result from the nature of the subject. (*Emerson v. Davies*, 3 Story, 768, 793.)

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Nothing that has been adduced on the part of the defendants affects the validity of the plaintiff's copyright, on the question of the originality and novelty of the "railroad scene" in his play.

The sale of Boucicault's play to other persons, with a view to its public representation, makes the seller a participant in causing the play to be publicly represented.

An injunction must, therefore, issue, restraining the defendants from the public performance and representation, and from the sale, for public performance or representation, of the "railroad scene" in the play of "After Dark," or of any scene in substance the same as the "railroad scene" in either of the two plays, as such scene is herein defined.

HENRY B. WHELPLEY

vs.

THE ERIE RAILWAY COMPANY. IN EQUITY.

A bill was filed against a corporation, by the holder of alleged shares of its capital stock, claiming that they had been illegally issued, the same having been issued by the conversion into stock of bonds issued by the corporation, and praying that their legality might be inquired into, and that, if they should be held to be illegal, the plaintiff might be repaid the amount paid by him for such alleged shares, and that the corporation might be enjoined, pending the suit, from disposing of so much of its property as would indemnify the plaintiff, and that a receiver of that amount might be appointed. It appearing that the moneys received by the corporation, on the issue of the bonds, had not been kept separate from its general funds, and could not be traced and identified: *Held*, that the injunction could not be granted, or the receiver appointed.

An order for an injunction or a receiver, will not be made in an improper case, even on the consent of both parties to the suit, more especially where the rights of third parties may be concerned.

(Before NELSON, J., Southern District of New York, December 16th, 1868.)

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THE bill in this case was filed against the Erie Railway Company, by a stockholder, charging that he was the owner of one thousand shares of its stock, and that they were a part of two hundred thousand shares overissued by said company, in violation of its charter, and contrary to law. It prayed that such issue of stock might be inquired into, and its legality, or illegality, be established; that, if it should be held that the said issue was illegal and void, the company might be decreed to pay to the plaintiff the amount paid by him for such spurious stock; that the company, pending the suit, might be enjoined from disposing of its property, or so much of it as would indemnify him; and that a receiver might be appointed, and the company be decreed to convey to him a sufficient amount of moneys, or securities, to enable him to pay to the plaintiff the advance made by him for said stock, with interest. The bill was filed on behalf of the plaintiff, and of all other persons holding the alleged overissued stock. The District Judge, at chambers, no opposition being made, and notice of the application being waived by the company, granted the injunction, and appointed a receiver. August Belmont and Ernest B. Lucke now came into court with a petition, setting forth that they were the holders of a portion of such overissued stock, and asked to be made parties to the suit, as provided for in the bill, and as interested in the question to be determined by the Court, and charged that the person appointed receiver was an unfit person, disqualified for the proper discharge of the duties of that office.

Charles O'Conor, for Belmont and Lucke.

Edwin W. Stoughton, David Dudley Field, and John K. Porter, for the defendants.

NELSON, J. The question involved in this alleged over-issue of stock depends upon the construction of several provisions of the laws of the State of New York concerning the powers and duties of railroad corporations. Different and conflicting constructions of such provisions are insisted upon

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by the respective parties, and the questions involved therein, must necessarily come up for consideration and disposal, on the final hearing of the case, on pleadings and proofs; but, in the view I have taken of the case, it will not be necessary, or, perhaps, proper, to express an opinion in respect to them, on this preliminary motion.

I am satisfied, on an examination of the bill, and of the papers in opposition, that a case has not been made out that will authorize the Court to uphold the order for the injunction, or for the appointment of a receiver, even assuming the stock in question to be a part of an illegal issue or an over issue. If the moneys received on the issue of the bonds which were converted into stock had been kept apart and separate from the general funds of the company, and could be traced and identified, an equity might well arise in behalf of the defrauded stockholders, against the particular fund, and attach to the same. In equity and conscience, the money paid on the issue of the bond, and thus traced and identified, would be the money of the person who paid it; and the holder of stock, into which the bond had been converted, and who would represent the bond on which the money was paid, would stand in the same equitable relation to the fund as the person who paid the money. But the bill, in this case, does not place the right of the plaintiff to follow the moneys advanced on the alleged fraudulent issues of stock, on the ground that such moneys were kept separate and apart from the general funds of the company. On the contrary, it sets up the right to have set apart from these general funds a sufficient amount to reimburse the plaintiff for these advances, thereby, impliedly, at least, admitting that they have been commingled with the general mass. Besides, the opposing papers show that this is the fact. Judge Story thus states the principle applicable to such a case, (*2 Story's Eq. Juris.*, § 1265): "Where there is any fraud touching property, they" (Courts of Equity) "will interfere, and administer a wholesome justice, and sometimes even stern justice, in favor of innocent persons who are sufferers by it, without

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any fault on their own side. This is often done by converting the offending party into a trustee, and making the property itself subservient to the proper purposes of recompense, by way of equitable trust or lien. Thus, a fraudulent purchaser will be held a mere trustee for the honest, but deluded and cheated, vendor." And, as stated by Lord Ellenborough, in *Taylor v. Plumer*, (3 *M. & S.*, 562, 575,) "it makes no difference, in reason or law, into what other form, different from the original, the change may have been made, whether it be into that of promissory notes for the security of the money which was produced by the sale of the goods," &c., "for, the product of, or substitute for, the original thing, still follows the nature of the thing itself, as long as it can be ascertained to be such, and the right only ceases when the means of ascertainment fail, which is the case when the subject is turned into money, and mixed and confounded in a general mass of the same description." (See, also, *Thompson v. Perkins*, 3 *Mason*, 232, and 2 *Story's Eq. Juris.*, § 1259.) In the latter condition of things, the aggrieved party can come in only as a general creditor, and is entitled to no preference, or priority, over that class of creditors. This is the condition of the plaintiff in this bill.

It is claimed, by the counsel for Belmont and Lucke, that the receiver should be removed as unfit and disqualified, on the facts set forth and admitted in the case, and some other person be appointed in his place; and that the company is estopped from contesting the matter, because it assented to the appointment of the receiver. I do not assent to this view. The company waived the notice which is required by the rules and practice of this Court, before an injunction can be issued; but the order for the injunction, and for the appointment of a receiver, depended upon the judgment of the judge who granted them. Indeed, I am not prepared to admit that an order for an injunction, or a receiver, can be made in an improper case, even with the consent of both parties, more especially where the rights of third persons may be concerned.

The United States v. Fullerton.

My conclusion, on the whole, is, that Belmont and Lucke be permitted to join as parties to the suit, that the injunction be dissolved, and that the order appointing a receiver be vacated and set aside.

THE UNITED STATES vs. WILLIAM FULLERTON.

The practice stated, in regard to certificates of division of opinion, in criminal cases tried in the Circuit Court, where the Court is held by two judges.

The probability that difficult and important questions of law will arise on the trial of an indictment in the Circuit Court, will not ordinarily justify the postponement of the trial, so as to await the holding of the Court by two judges, with a view to a certificate of division of opinion.

(Before NELSON, J., Southern District of New York, December 17th, 1868.)

THIS was an application on the part of the defendant to postpone the trial of the indictment in this case, until such time as the Associate Justice of the Supreme Court assigned to the Second Circuit, could sit in the Circuit Court with the District Judge who was now holding it, on the ground that difficult and important questions of law would arise on the trial, so that, if a division of opinion should occur between the judges, the point or points could be certified to the Supreme Court, under the 6th section of the Act of April 29th, 1802, (2 *U. S. Stat. at Large*, 159,) that being the only mode of sending questions of law, arising on the trial of a criminal case, to the Supreme Court for revision.

NELSON, J. The practice in question has heretofore been confined, with few exceptions, to the trial of capital cases; and, even in those, I do not now recollect an instance where any division of opinion occurred on the trial, resulting in a certificate of a question to the Supreme Court. Generally speaking, motions in arrest of judgment, or for a new trial, which are liberally indulged, afford sufficient security against

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errors or mistakes at the trial. A division of opinion may be certified on a motion in arrest of judgment, (*United States v. Kelly*, 11 *Wheaton*, 417,) though it cannot on a motion for a new trial. But, where there is a difference of opinion on a motion for a new trial, such a direction will be given to the case as will enable the defendant to obtain a certificate of a division under the statute. A new trial will be granted, and the cause will be again submitted to a jury in the presence of the two judges, and the question or questions will be regularly certified. This has occurred in a very few instances in the Northern District of New York, and also in the Southern District of New York, and, indeed, as far as I can remember, in every case where a serious and well-grounded difference existed.

I think that, under these guards and securities against error, on the trial of the current and ordinary offences against the laws, the contingency or possibility of a difference of opinion between the two judges on the trial does not present a case which would justify an interference with the trial of the cause in the usual way, in conformity to the practice in criminal cases.

WILLIAM M. BAIRD

vs.

THE SHORE LINE RAILWAY COMPANY. IN EQUITY.

This Court has jurisdiction of a suit in equity brought to restrain the building of a bridge across the Connecticut river, between Saybrook and Lyme, to be used for a railroad, although the construction of such bridge is claimed to be authorized by the Legislature of the State of Connecticut.

The construction of such a bridge was enjoined until the final hearing of the cause.

(Before NELSON and SHIPMAN, JJ., Connecticut, December 19th, 1868.)

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THE plaintiff, a resident of Philadelphia and a citizen of the State of Pennsylvania, filing this bill in equity, praying for a perpetual injunction against the defendants, to restrain them from building a bridge across the Connecticut river, connecting their railroad track, between Saybrook and Lyme. He alleged that they were proceeding to erect the bridge, and that the same would very seriously obstruct the navigation of the river. The defendants, by their answer, set up that they were proceeding to erect such bridge under and by virtue of authority conferred on them by a statute of the State of Connecticut, and that the structure which they were erecting was not intended to obstruct, and would not in fact obstruct, to any considerable extent, the free navigation of the river. The plaintiff, who alleged that he was an owner of vessels enrolled and licensed under the Act of Congress, and engaged in running on said river, and interested in the navigation thereof, now moved that the defendants be temporarily enjoined against the further erection of the bridge, until the final hearing on the bill, answer, and proofs. This motion was founded on the bill and accompanying affidavits in support of its allegations. The defendants opposed it on their answer and on affidavits.

Richard D. Hubbard and *William Hammersley*, for the plaintiff.

Henry B. Harrison and *Tilton E. Doolittle*, for the defendants.

SHIPMAN, J. We do not propose, at this stage of the controversy, to enter into a lengthy discussion of the important questions involved. As we intimated to the counsel on the hearing, we have no doubt on the question of jurisdiction raised by the defendants. The Connecticut river, at least at the point where this bridge is being erected, is a public river, free to all for the purposes of navigation. We regard the right of this plaintiff, as well as that of every other citizen, to its free navigation, as secured by the Constitution and the

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laws of the United States. Any material obstruction to the exercise of this right is a wrong which this Court has power to redress. As the injury complained of is of that peculiar character for which the remedy at law is not adequate, resort must be had to equity, and the plaintiff has, therefore, filed his bill on the equity side of the Court. Over the questions thus presented, as we have stated, we think this Court has ample jurisdiction. This jurisdiction is not impaired by the law of the State authorizing the erection of the bridge, for the Constitution and laws of the United States, by which the free navigation of the river is secured, are paramount to the authority assumed to be exercised by the State.

After elaborate arguments, and upon due consideration of the proofs as they now stand, we think that the defendants should be enjoined until the case can be brought to a final hearing. The Connecticut river is an important river, emptying into a great arm of the sea, and over its waters a considerable commerce is carried on by citizens of other States as well as by those of Connecticut. It is navigable for large vessels for some fifty miles from its mouth, and it is very near its mouth that the defendants are engaged in erecting the bridge. In this particular, the case is without parallel in the history of this country, so far as we are informed. We are not aware that the attempt has ever before been made to throw a permanent bridge across a large navigable river, at or very near its entrance into the sea. Of course, to whatever extent the navigation may be endangered or obstructed, the danger and inconvenience will be felt by the whole commerce of the river. We are satisfied, upon the proofs, as they now stand, that the free navigation of this river will be materially abridged, and the commerce over it be seriously incommoded and burdened, by the erection of the structure on which the defendants are now engaged. We are now treating the case in its present aspect, leaving, of course, a final judgment upon this and other questions involved, to a later stage in the suit, when the proofs shall be fully presented. We, therefore, purposely abstain from dwelling at length on the points in issue

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between the parties, and content ourselves with the announcement that, on the facts now before us, we deem it our duty to temporarily arrest the construction of this bridge.

It is proper to add, that we regard this as the best course for all concerned, for, while it leaves all the important questions open for examination on final hearing, it will effectually prevent the introduction into the case of that element of embarrassment, arising out of large expenditures, which has been felt in the later stages of cases of a similar character. Though the defendants are thus subjected to delay, they are at the same time relieved from any hazards. The enjoyment of their railway franchise, as they have used it for many years, is not interfered with. On the contrary, their rights, as they have existed and been enjoyed down to the present time, and the immemorial rights of all to the free and unobstructed navigation of the river, are preserved until the final determination of the grave questions involved in the case.

Let an injunction issue.

E. N. KELLOGG AND OTHERS

vs.

GEORGE M. BARNARD.

On the facts of this case, a sale of wool was held not to be a sale by sample, with a warranty that the bulk of the wool should equal certain samples of it. What the rule of *caveat emptor* is, stated.

A custom of the wool trade, which supplies, on a sale of wool in bales, a warranty against its being falsely packed, is valid.

Where such a custom exists, qualified by the condition that the seller must, within a reasonable time, be notified and furnished with the marks and numbers of the bales claimed to be falsely packed, the purchaser is entitled, on compliance with such condition, to recover from the seller the damages sustained by reason of false packing.

(Before SHIPMAN, J., Connecticut, December 21st, 1868.)

THIS was an action on the case, tried before the Court without a jury. The Court found the following facts: The plaint-

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iffs are merchants, and dealers in wool, at Hartford, Connecticut, and the defendant was a commission merchant, and an importer of and dealer in foreign wool, at Boston, Massachusetts. George W. Bond & Co. were wool brokers at Boston. On the 13th of July, 1864, said Bond & Co. wrote E. N. Kellogg & Co., who were some of the plaintiffs in this suit, the following letter: "Boston, July 30th, 1864. Messrs. E. N. Kellogg & Co. Gent. We send you to-day, by request of our junior, the following samples of Mestiza wools—961, S. T. 64 bales, No. 1, 50 cents; 962, S. T. 15 bales, No. 1, 50 cents; 963, N. 71 bales Merino, 55 cents; 964, V. 24 bales, No. 1, 50 cents. With 963 there are two low bales at half price. These are the lowest prices we have been able to obtain, and they depend entirely upon gold valuation. We should be happy to hear from you on either or all lots. We remain yours, truly, Geo. W. Bond & Co." This letter, with the samples of wool therein referred to, was received, in due course of mail, by Kellogg & Co. Subsequently, the following correspondence, by telegraph and mail, passed between Bond & Co. and Kellogg & Co.: "To E. N. Kellogg & Co., Hartford. August 2d, 1864. If fifty cents all round is offered for Mestiza wool, may sell. Geo. W. Bond & Co." "To Geo. W. Bond & Co., Boston. August 6th, 1864. Party will take four lots Mestiza, if they compare with samples, at fifty cents, fifteen days. E. N. Kellogg & Co." "To E. N. Kellogg & Co. August 6th, 1864. Have Mestiza, four lots, but must be examined Monday. Geo. W. Bond & Co." "Boston, August 6th, 1864. Messrs. E. N. Kellogg & Co., Hartford. Gentlemen. Your telegram received, offering 50 cents cash, 15 days, for the 4 lots Mestiza, equal to sample or no sale, and we have closed the wool, for you to be here Monday, without fail. This is our point in the sale, that it must be reported on by that time. You have got a bargain, as the market now stands. Very truly yours, Geo. W. Bond & Co." The last-named letter was received by Kellogg & Co. on Saturday evening, Aug. 6th. On Sunday evening, the senior member of the firm, E. N. Kellogg, went to Boston. On Monday morning, August 8th,

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he proceeded to the store of Bond & Co., where a sample bale of each of the lots of wool had been previously sent by the defendant, that they might be examined by such customers as were seeking to purchase. The sample bales were put up in the usual way of Mestiza wool. The wool had been packed at Buenos Ayres, in South America, and brought to this country in iron-bound bales of about 1,000 pounds each. The bales stood on end in the store of Bond & Co., with one or two of the end hoops broken, and the burlaps or bagging, inclosing the same, partially removed. Kellogg proceeded to examine the same in the customary way of purchasers of such wool, by taking up and inspecting the loose places which had been rendered accessible by removing a portion of the hoops. Both the preparation of the bales for examination by Bond & Co., and the examination of the bales by Kellogg, were in the customary mode observed in the sale of foreign wool of this character. After examining the loose places that were accessible, Kellogg was informed, by Bond & Co., that the bulk of the wool was in the United States bonded warehouse, that he could go and examine it there if he chose, and that the bales would be sufficiently opened for that purpose. He declined to do this, and concluded the purchase on the joint account of all the plaintiffs. In this purchase were seventy-three bales of Mestiza wool, which, it was alleged, were subsequently found to have been falsely and deceitfully packed. This suit related to these seventy-three bales. The examination of the interior of the bulk of bales of wool generally put up like these, was not customary in the trade, and, though possible, would be very inconvenient, and attended with great labor and delay, and, for these reasons, was impracticable. On the 17th of August, the wool purchased was weighed out, paid for, and delivered to Bond & Co., as the agents of the plaintiffs for that purpose. They stored the same in Boston, subject to the plaintiffs' order, where it remained till March, 1865. On the 19th of January, 1865, the plaintiffs sold the seventy-three bales in question to Lounsbury, Bissell & Co., of Norwalk, Connecticut, and the same were shipped at Boston to

the latter firm, in March, 1865. In April following they proceeded to open some of the bales, to use in their manufactory at Norwalk. They immediately notified the plaintiffs of the condition in which they found the wool in the few bales they had opened. The plaintiffs proceeded to Norwalk, and, after having satisfied themselves of the condition of the wool, notified Bond & Co., on the 1st of May, 1865, that the same was "false packed and damaged," and "entirely different from the samples." This notice to Bond & Co. was immediately communicated to the defendant, who replied by requesting that the marks and numbers of the bales found falsely packed might be sent to him, and promising that he would then examine into the matter, and do what was proper and just. This request and promise were immediately communicated to the plaintiffs. The only visible mark on any of these seventy-three bales, so far as the proof showed, was the mark S. T., being the initials of Samuel Tyler, who bought the wool at Buenos Ayres, had it packed there, and consigned it to the defendant at Boston. This mark was on each bale. The bales were all regularly numbered, and the numbers were marked thereon. The plaintiffs, within a reasonable time, caused to be delivered to the defendant the numbers and weights of twenty-four bales respectively, but not the marks. The defendant then waived his request for, and his right to call for, the marks on these twenty-four bales. The defendant also waived his request for, and his right to call for, the marks and numbers on eleven other bales, and caused those eleven bales to be examined by his own agents duly authorized for that purpose. As to the remaining thirty-eight of the seventy-three bales, no marks or numbers were ever furnished by the plaintiffs to the defendant, nor did he ever waive his right to call for the same. By the custom of merchants and dealers in foreign wool in bales, in Boston and New York, the principal markets of this country where such wool was sold, there was an implied warranty by the seller to the purchaser, that the same was not falsely or deceitfully packed, and, whenever any such wool was sold, and was, within a reasonable

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time, found to be falsely and deceitfully packed, the seller, on notice from the purchaser, given in a reasonable time, of the fact of such false packing, and of the marks and numbers on the bales, was bound, by the custom of such merchants, to indemnify the purchaser, and make good to him any loss or damage he might have sustained in consequence of such false and deceitful packing. The seventy-three bales of wool in question were in fact falsely and deceitfully packed, by placing in the interior of them rotten and damaged wool, dirt and dung, which materials were foreign to, and did not properly belong to, or with, the fleeces. This foreign matter was concealed by an outer covering of fleeces in their fair and ordinary state, thus forming a fair but deceitful exterior to the bales. The loss and damage sustained by the plaintiffs in consequence of such false and deceitful packing of the twenty-four bales, the numbers and weights of which they furnished the defendant, and the right to call for the marks of which the defendant waived, was \$2,500. The loss and damage sustained by the plaintiffs in consequence of such false and deceitful packing of the eleven bales, the right to call for the marks and numbers of which the defendant waived, was \$1,100. The loss and damage sustained by the plaintiffs in consequence of such false and deceitful packing of the remaining thirty-eight bales, was \$4,100. When the defendant sold to the plaintiffs the seventy-three bales of wool, he had no knowledge, or reason to believe, that they, or any of them, were falsely or deceitfully packed, and sold the same in good faith, supposing that they were fairly and honestly packed. The defendant was not the absolute exclusive owner of the wool, but it was consigned to him by Samuel Tyler, who bought it in good faith in Buenos Ayres, and the defendant had advanced to Tyler the funds for its purchase. The only interest the defendant had in the wool was in the nature of a lien on the same for his advances and commissions. The plaintiffs bought the wool from the defendant directly, through his brokers, and with no knowledge or reason to believe that any person other than the principal for whom the brokers

were acting, had any interest therein. The brokers did not disclose the name of the defendant till the wool was weighed and billed, nor were they requested to do so before that time. Bond & Co. were employed by the defendant to negotiate for the sale of the wool, as well-known brokers engaged in effecting sales of such merchandise, but they had no express authority to complete a sale without first reporting the conditions or terms to the defendant. The defendant instructed them that he would not sell by sample at all, but would sell if the party would come to Boston, examine the wool, and accept it immediately. This instruction was not known to the plaintiffs, beyond what might be inferred from the fact that they were required to come to Boston and examine the wool, as stated in the telegram and letter before set forth. The examination by Kellogg, at the time he purchased the wool, did not reveal any false packing, nor did he, or any of the other plaintiffs, discover that the same was falsely packed, until the fact was communicated to them by Lounsbury, Bissell & Co., in April, 1865.

SHIPMAN, J. (1.) This was not a sale by sample. Though samples were forwarded to the plaintiffs, and they replied by an offer of "fifty cents all round," provided the bulk equalled the samples, yet the brokers informed them that one point in the sale was, that they must be in Boston on Monday and examine the wool. The telegram and the letter of the 6th of August, from the brokers, taken together, show that it was not their intention to sell without an examination was first made by the buyer. These communications were both of them sent after the offer had been made by Kellogg & Co. to purchase by the samples, and apprized the plaintiffs that the sale must be upon the usual examination of the article. If the plaintiffs intended to rely on the samples, and purchase on that basis, their journey to Boston, and their examination of the bales at the brokers' store, were wholly superfluous. More than this, the examination of the bales at the brokers' store, after notice that such examination was necessary before

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the contract could be completed, was inconsistent with the idea of a sale by sample, with a warranty that the bulk of the wool should equal the specimens sent to Hartford. The exposure of the few bales at the brokers' store was, in no sense, a presentation of samples warranted to accurately represent the bulk. The object of the exhibition of these bales was doubtless correctly stated by Mr. Kellogg, one of the plaintiffs, who said, in his testimony, that it was "to inspire confidence." It was an appeal to the judgment and discretion of the purchaser. There was no express warranty that the bales not examined should accurately correspond to those exhibited at the brokers' store. The law cannot, under the circumstances, imply such warranty.

(2.) This was a sale where, as to the general character and quality of the goods, the maxim, *caveat emptor*, applies. "Where goods are *in esse*, and may be inspected by the buyer, and there is no fraud on the part of the seller, the maxim, *caveat emptor*, applies, even though the defect which exists in them is latent and not discoverable on examination, at least where the seller is neither the grower nor the manufacturer. The buyer, in such a case, has the opportunity of exercising his judgment upon the matter; and, if the result of the inspection be unsatisfactory, or, if he distrusts his own judgment, he may, if he chooses, require a warranty. In such a case, it is not an implied term of the contract of sale, that the goods are of any particular quality or are merchantable." (*Jones v. Just*, *Eng. Law Rep.*, 3 Q. B., 197, 202.)

(3.) This was a sale under a custom of the trade which supplies a warranty against false packing. The validity of a custom somewhat similar to this was recognized by the Supreme Court of Massachusetts, in *The Casco Manufacturing Co. v. Dixon*, (3 Cush., 407.) The Court has, in the present case, found that the custom existed, qualified by the condition that the seller must be notified and furnished with the marks and numbers of the bales claimed to be falsely packed. The main practice of the custom, to wit, that there is, in the sale of wool packed in bales as this was, a warranty of the seller

against false packing, was proved by the concurrent testimony of many of the witnesses on both sides. The point of difference among them was touching the time within which the buyer must give the seller notice of the fraud and make his claim. On this point there was great diversity of opinion among the defendant's witnesses. But the conclusion which the Court arrived at, on the whole evidence, and which is stated in the finding of facts, is, that notice of the fraud, and of the marks and numbers on the bales, must be given to the seller in a reasonable time. This, indeed, is the only practicable rule in connection with, or as a part of, the custom. What a reasonable time is, is a question of fact, to be determined as each case arises.

(4.) The Court has found that notice of the fraud was, in this case, given to the seller in a reasonable time; and that, as to the marks and numbers, the numbers on twenty-four bales were furnished the seller within a reasonable time, and the furnishing of the marks was not insisted on, but was waived. As to eleven other bales, it was found that the defendant waived all claim to have the marks and numbers furnished to him. He caused those bales to be examined by his own agents. He must at that time have well known that the wool in question was part of the lot he received on consignment from Tyler. This is doubtless the reason why he did not insist on the marks, when the numbers and weights of the twenty-four bales, severally, were presented to him. All of the seventy-three bales were marked S. T., and this was the only mark, except the numbers, which it was proved was on the bales. It was by this mark that they were billed to the plaintiffs.

(5.) It follows that the plaintiffs have a right to recover \$3,600, being the loss sustained by them on thirty-five bales, the marks and numbers on which were furnished to the seller, or were waived by him. They are entitled also to recover interest at the rate of six *per cent. per annum*, on that amount, from January 19th, 1865, to the present time.

(6.) As to the loss sustained on the remaining thirty-eight

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bales, amounting to \$4,100, the plaintiffs are not entitled to recover. It was their duty to have furnished the marks and numbers on these bales, or been excused therefrom by the defendant. This part of the custom must be complied with in order to entitle the purchaser to make a valid claim. It may, and often must, be important for the seller to have these marks and numbers, for the purpose of enabling him to identify the article as one sold by him, and of furnishing him with the means of resorting to the person who sold or consigned the goods to him. It is easy for the purchaser to furnish the marks and numbers, as they are on the bales. The plaintiffs having failed to comply with this feature of the custom upon which alone they can rely, so far as these thirty-eight bales are concerned, and the defendant never having waived his right to insist on such compliance, the plaintiffs must, to that extent, fail to recover.

In re THOMPSON GREENFIELD, A BANKRUPT.

The 29th section of the bankruptcy Act of March 2d, 1867, (14 *U. S. Stat. at Large*, 531,) requires a bankrupt to apply for a discharge from his debts within one year from the adjudication of bankruptcy, only in cases where, by reason of no debts having been proved against him, or of no assets having come to the hands of his assignee, he can apply for a discharge within less than six months from such adjudication.

(Before NELSON, J., Southern District of New York, December 24th, 1868.)

THIS was a petition for a review of an order of the District Court, refusing a discharge to a bankrupt. The decision of the District Judge, (BLATCHFORD, J.,) was as follows: "The adjudication of bankruptcy was made on a voluntary petition, on the 28th of August, 1867. On the 22d of October, 1868, the bankrupt petitioned for his discharge. The petition is in the form of Form No. 51, and does not state either that no debts have been proved against the bankrupt, or that no assets have come to the hands of the assignee.

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The question arises, whether a discharge must be withheld for the reason that the bankrupt failed to apply to the Court for a discharge from his debts within one year from the adjudication of bankruptcy. It has been decided by the District Court for the Northern District of New York, (*in re Wilmott*, 2 *Bankrupt Register*, 76,) that section 29 of the Act requires that, in all cases, a discharge must be applied for within one year from the adjudication of bankruptcy, and that, if it be not applied for within that time, it cannot be granted. Such is also the views of the authors of two elementary works on the statute. (*Avery & Hobbs' Bankrupt Law*, p. 210; *James' Bankrupt Law*, p. 133.) My attention has not been called to any other authority on the subject. I have serious doubt whether this is the proper construction of the 29th section. The language of that section is, 'that, at any time after the expiration of six months from the adjudication of bankruptcy, or, if no debts have been proved against the bankrupt, or, if no assets have come to the hands of the assignee, at any time after the expiration of sixty days, and within one year from the adjudication of bankruptcy, the bankrupt may apply to the Court for a discharge from his debts.' It is contended, that the provision consists of two parts, and is to be read as if it were worded thus: (1.) At any time after the expiration of six months from the adjudication of bankruptcy, and within one year from the adjudication of bankruptcy, the bankrupt may apply, &c.; (2.) If no debts have been proved against the bankrupt, or, if no assets have come to the hands of the assignee, the bankrupt may, at any time after the expiration of sixty days from the adjudication of bankruptcy, and within one year from the adjudication of bankruptcy, apply, &c. There is no doubt that the privilege granted by the Act must be enjoyed, if at all, subject to the conditions and limitations as to the time of applying for the discharge, which are imposed by the Act. The only question is as to what are the limitations. In order to maintain the construction which would withhold a discharge in this case, the words, 'and within one year from the adjudication of bankruptcy,' must

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be held to apply equally to, and to be connected equally with, and to qualify equally, each one of the two branches of the same sentence which precede them therein—the one branch consisting of the words, ‘at any time after the expiration of six months from the adjudication of bankruptcy,’ and the other branch consisting of the words, ‘if no debts have been proved against the bankrupt, or, if no assets have come to the hands of the assignee, at any time after the expiration of sixty days.’ Now, the first of such branches contains a complete idea in itself—‘at any time after the expiration of six months from the adjudication of bankruptcy,’ without any aid from any thing contained in the subsequent words, ‘and within one year from the adjudication of bankruptcy.’ But the second of such branches does not contain a complete idea in itself. It merely says, that, in the case of no debts proved, or in the case of no assets, then, ‘at any time after the expiration of sixty days;’ but it does not state where the computation of sixty days is to commence. The idea would have been complete if it had said, ‘after the expiration of sixty days from the adjudication of bankruptcy.’ The words, ‘from the adjudication of bankruptcy,’ must be supplied, in the second of such branches, from some source; otherwise, it has no meaning. Those words are found in the first of such branches; and, if they had been transplanted from their position in the first of such branches, and placed in the second of such branches, after the words ‘sixty days,’ there would have been no doubt whatever that the words, ‘and within one year from the adjudication of bankruptcy,’ were intended, and must have been held, to qualify and apply to both of such branches. But, in judicial construction, such transplanting would be a forced process. In the use of written language, qualifying words generally relate back to something that precedes, and do not reach forward to something that follows. The words, ‘from the adjudication of bankruptcy,’ which are needed to make sense of the second of such branches, are found immediately following it, in the words, ‘and within one year from the adjudication of bankruptcy,’ and naturally

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relate back to, and apply to, and qualify, the second of such branches, so as to make it read, 'at any time after the expiration of sixty days, and within one year, from the adjudication of bankruptcy.' Now, if the clause, 'and within one year from the adjudication of bankruptcy,' be thus necessarily adjunct and auxiliary to the second of such branches, in order that it shall have any sensible meaning, such clause thereby becomes an integral part of the second of such branches, and the sentence thus resolves itself into two members, which provide severally: (1.) That, at any time after the expiration of six months from the adjudication of bankruptcy, but not sooner, the bankrupt may apply, &c.; (2.) That, if no debts have been proved, or there are no assets, he may apply at any time after the expiration of sixty days from the adjudication of bankruptcy, and not sooner, provided he applies within one year after such adjudication. In this view, if debts have been proved, and there are assets, he is obliged to wait for six months, but, after that, he is not restricted in time. If he is in a position to apply after waiting only sixty days, he must do so within a year. It may have been thought that, when there are debts proved, as well as assets in the hands of the assignee, there should be no requirement that the application for a discharge be made within a year after the adjudication, but that, when there are either no debts proved, or no assets, there ought to be such a requirement. It is difficult, indeed, to see a reason for such a distinction, but not more difficult than it is to see why there should be such a requirement in any case. The provision, in section 21, against unreasonable delay, will not work more in the interest of creditors, by reason of such requirement, because, by virtue of such requirement, a delay of a year, which might otherwise be unreasonable, is made reasonable. Still, in view of the decision before referred to, and of the fact that there would be greater mischief in granting a discharge in this case, on a mistaken view of the statute, than in erroneously withholding one, I shall refuse a discharge, with a view to afford an opportunity for a review of the question by the Circuit Court, on a proper proceeding to be instituted under section 2 of the Act."

Coleman v. Martin.

Sullivan & Bracken, for the bankrupt.

NELSON, J. I have examined the 29th section of the bankruptcy Act, discussed by Judge Blatchford, in this case, and his opinion upon it; and, after the best consideration I have been able to give, concur in that opinion. I think the fair grammatical construction excludes the limitation of the one year from the first clause in the section, and that there is reason for the distinction between the case where there are creditors and assets, involving delay in the proceedings, and in the settlement of the estate before the Court, and the case where there are either no creditors, or no assets, or, rather, no debts proved, or no assets to be assigned. The objection is very technical, and a contrary view leads to no useful result. The order of the District Court is reversed, and a discharge is directed to be given.

CHARLES R. COLEMAN

vs.

D. RANDOLPH MARTIN, AND OTHERS. IN EQUITY.

Under Rule 66 of the Rules in Equity prescribed by the Supreme Court, the answer of every defendant in a suit in equity, when sufficient, must be replied to, without reference to the state of the cause or of the pleadings in regard to any other defendant.

The practice as to enlarging the time for the plaintiff to take proofs, under such circumstances, stated.

(Before BLATCHFORD, J., Southern District of New York, December 30th, 1868.)

BLATCHFORD, J. Under Rule 66 of the Rules in Equity prescribed by the Supreme Court, the answer of every defendant, when sufficient, must be replied to, without reference to the state of the cause or of the pleadings in regard to any other defendant. The replication must be a general one.

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Rule 45 abolishes special replications. Any defendant, whose answer is sufficient, has a right to have the cause, as to him, put at issue, so that he may, under Rules 67, 68, and 69, proceed to take his testimony, if he wishes to. But, where the cause is not at issue as to all the defendants, and where it is not proper to compel the plaintiff to go to proofs until it is at issue as to all of them, the Court will, on a proper application, enlarge the time, under Rule 69, for the plaintiff to take proofs in respect of the defendants as to whom the cause is at issue.

Enoch Louis Lowe and Robert J. Brent, for the plaintiff.

Enoch L. Fancher, for the defendant Martin.

In re JOHN H. KIMBALL, A BANKRUPT.

Where flour was sent by A. to B., to be sold on commission, and the proceeds were to be remitted to A., less the commission of B., and the flour was sold but the proceeds were not remitted, and B. was adjudged a bankrupt by the District Court, and afterwards was arrested in an action founded on the transaction, brought against him by A., in a State Court:

Held, That the debt was one created by the defalcation of B. while acting in a fiduciary character, within the meaning of section 33 of the bankruptcy Act of March 2d, 1867, (14 *U. S. Stat. at Large*, 533,) and that B. was, therefore, liable to such arrest, notwithstanding the provision of section 26 of said Act.

Held, also, that the question whether, in such case, B. could be discharged from arrest by the bankruptcy Court, depended upon the case presented on which the arrest was made.

(Before NELSON, J., Southern District of New York, January 14th, 1869.)

THIS was a petition for a review of an order of the District Court refusing to discharge the bankrupt from arrest, and, also, refusing to discharge the bail given by him thereon. He was adjudged a bankrupt on the 26th of May, 1868. The arrest was made on or about the 5th of June thereafter, in an action brought in a State court, and on an order of arrest

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founded on an affidavit setting forth that, on the 23d of December, 1867, the plaintiff forwarded 21,250 pounds of buck-wheat flour to the bankrupt, to sell on commission, and remit the proceeds, less the commission. The flour was sold on or about the 20th of February, 1868, by the bankrupt, who received therefor \$758 $\frac{7}{8}$ over and above the commission, but failed to remit the proceeds, or any part thereof. They were subsequently demanded from him, but he refused to pay them, saying that he had no means of payment, and had applied the money to his own use. Soon afterwards he applied for the benefit of the bankruptcy Act, and closed his commission business.

NELSON, J. The application for the discharge of the bankrupt from arrest is founded on the latter clause of the 26th section of the Act, which provides, that "no bankrupt shall be liable to arrest during the pendency of the proceedings in bankruptcy, in any civil action, unless the same is founded on some debt or claim from which his discharge in bankruptcy would not release him." The 33d section provides, that "no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or *while acting in any fiduciary character*, shall be discharged under this Act." The District Court held that the debt in this case was created by the defalcation of the debtor while acting in a fiduciary character, and would not be discharged in bankruptcy, and, hence, refused to discharge him from arrest. I am inclined to concur in this opinion. I concur the more readily, as the decision of the question by the District Court extends, in its operation and effect, only to the matter of arrest, and does not affect the question ultimately to be determined, whether the debt will or will not be discharged by a discharge in bankruptcy. The simple question here is, under the 26th section, whether the Court will discharge the bankrupt from arrest during the pendency of the proceedings, and nothing more; and this must depend upon the case presented on which the arrest was made in the action in the State Court. Look-

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ing at it as thus presented, it seems to me there is great difficulty in saying that the flour was not received and held by the bankrupt in a strictly fiduciary character. The article was placed in his possession simply to sell it, and to remit the proceeds over and above his commission. The money was not the bankrupt's when it was received on the sale, but was the money of the owner of the flour. It was a gross breach of trust to apply it to his own use.

I have looked at the case of *Chapman v. Forsyth*, (2 How. 202,) but do not regard it as controlling the one in hand. The provision in the present Act is much broader than that in the Act of 1841.

The order of the District Court is affirmed.

WILLIAM RATHBONE AND OTHERS

vs.

FREDERICK R. FOWLER AND OTHERS.

Where a vessel and her cargo were in the common peril of going down together in deep water, where the vessel was anchored, the bows of the vessel being cut through by ice, and the master of the vessel ran her ashore, with her cargo, in shallower water, and the vessel was injured by lying on an uneven bottom, when so stranded, and all of the cargo was saved, a part of it without being wet: *Held*, that the case was one of voluntary stranding, authorizing a general average among ship, freight, and cargo, of the loss and damage caused by the stranding.

Damage caused to the vessel by the swelling of linseed in her cargo, through its being wet by water, which came through the holes made in the vessel by the ice, and damage to the cargo by such water, must be regarded as damage from a peril of the sea, and, therefore, not to be allowed for in general average.

That the water which damaged the cargo entered through such holes after the master determined to strand the vessel, makes no difference.

In view of the terms of the average bond in this case, and of the usage of the port in like cases, it was proper, in adjusting the average to take, as the contributory value of the freight, one-half of the gross freight agreed to be paid for the voyage on which the disaster occurred.

(Before BLATCHFORD, J., Southern District of New York, January 22d, 1869.)

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THIS was an action of *assumpsit*, brought by the owners of the ship *Oneiza*, to recover from the defendants, as consignees and owners of cargo transported on board of that vessel, on a voyage made by her from Calcutta to New York, a sum alleged to be due to the plaintiffs, by way of a general average contribution, for losses and expenses suffered and incurred in consequence of an alleged voluntary stranding of the ship. It was tried before Mr. Justice Nelson and a jury, on the 4th of June, 1868, and a verdict was taken, by consent, for the plaintiffs, for \$12,077.73, subject to the opinion of the Court on a case to be made, and a readjustment, if necessary, to be ordered by the Court, with liberty for either party to turn the case into a bill of exceptions.

The ship arrived off Sandy Hook, on the 16th of January, 1867, and anchored on that night inside of the Hook. There was so much ice in the Bay, that she could not proceed until the 21st, when she was towed up, in the afternoon, as far as the Quarantine ground, and anchored there. The water was full of floating ice. The next morning it was discovered that the ship was settling by the head, and, by seven o'clock A. M., she had six feet of water in her. The leak was caused by holes broken in both of her bows by the ice. Ineffectual attempts were made to free her from water by her pumps, and, the water being about forty-two feet deep where she was anchored, her master caused her to be towed a distance of three hundred yards, into shoaler water, on the Staten Island flats, until she grounded on the bottom at about eight o'clock A. M. At the time she grounded, she had ten feet of water in her. If she had sunk where she was anchored, she would have been totally submerged. A wrecking vessel, with divers and assistance, reached her about noon. The tide was then about an hour ebb, and the water was about the same height inside of her and outside. A diver was sent down, and the holes were stopped. A pump was then started about three or four o'clock P. M. The water had reached to within two feet of her upper deck. Some of her cargo was not wet. The cargo consisted of gunny cloth, linseed in bags, jute, saltpetre, gunny bags,

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and matting. She was pumped out by about eight or nine o'clock P. M., and, after that, she was kept free of water, and no more water reached her cargo. About half of her cargo was discharged into lighters, and she was then taken to the city, and the rest was discharged. The ship could have been raised, if she had sunk where she was anchored. The question of saving the vessel and cargo at either place was only a question of the expense of raising them. The wrecking bill was over \$12,000, and would have been \$30,000, if she had sunk where she was anchored.

The defendants, on the 23d of January, 1867, signed an agreement, commonly called an average bond, whereby they agreed to pay, as consignees of cargo, what should be found to be due from them, on their share of the cargo, for general average losses and expenses arising out of the transaction, provided such losses and expenses should be stated and apportioned by Johnson & Higgins, average adjusters, in accordance with the established usage and laws of the State of New York in similar cases. Such an adjustment was made by Johnson & Higgins, according to the usage and customs of the port of New York, and they ascertained the balance due from the defendants to be \$11,380.78, July 20th, 1867. The adjusters made no allowance to the defendants for the damage sustained by their cargo from the water which entered the ship, on the ground that such damage was caused by water which entered through the holes made in the bows of the vessel by the ice, and, therefore, by a peril of the sea, and was not caused by the stranding, and was not a general average loss, toward which the ship and her freight should contribute. The effect of the water upon the linseed in bags was to swell it very much, and strain the ship considerably. The swelling of the linseed and the lying on an uneven bottom at the place of stranding, together, started up the deck and strained and broke the beams and the straps over the beams. The adjusters did not allow, as a general average loss, anything for any damage sustained by the ship from the swelling

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of the linseed, on the ground that such swelling was caused by water which entered through the holes in the bows, from a peril of the sea, and, therefore, was not caused by the stranding; but they did allow, as a general average loss, the damage caused to the ship by lying on an uneven bottom, when stranded. The salvage expenses were put into general average. According to custom, one half of the gross freight for the whole voyage was taken as the net freight to be contributed for.

Edward H. Owen, for the plaintiffs.

James C. Carter and *Townsend Scudder*, for the defendants.

BLATCHFORD, J. 1. The first question which arises is, whether there was a voluntary stranding of the ship, in such a sense as to authorize a general average, among ship, freight, and cargo, of the loss and damage caused by the stranding. The defendants contend that there was no voluntary stranding. The only damage to the ship, which it is claimed by the plaintiffs should be contributed for in this case, in general average, is the damage caused by her lying on the uneven bottom, when stranded. That damage was manifestly caused by the stranding, and by nothing else. There was a peril common to both vessel and cargo, where the vessel was anchored, at the time the master determined to strand her. That common peril was the danger of their going down together in deep water, where they would be entirely submerged, and where the cargo would have remained much longer under water, and been much more injured, and where the expense of raising them would have been much greater. This common peril was imminent and apparently inevitable, unless the ship should voluntarily incur the damage which has happened to her from lying on the uneven bottom, on the flats, in shallower water, for the purpose of putting the bulk of the cargo in a position where it would not be required to remain so long under water as if it had sunk in the deeper water, and for the

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purpose of preventing a part of it, as it turned out, from being at all wet. The injury to the ship by her lying on the uneven bottom on the flats where she was stranded, was a voluntary *jactus* of the ship, in that regard, to avoid the peril above named, and was a transfer of such peril, in that regard, from vessel and cargo to vessel alone. The attempt to avoid the peril was successful. All the elements exist in the case which make up a voluntary stranding, as settled by the Supreme Court. (*Barnard v. Adams*, 10 *Howard*, 270, 303). The cargo was rescued, by the stranding, from the peril of the deep water, and the vessel was injured by such stranding. The vessel suffered to benefit the cargo. The case is, in my judgment, a very plain one for a general average contribution.

2. The adjusters did not make any improper allowance to the ship. They only allowed for the damage caused to her by lying on the uneven bottom. They did not allow for any damage caused to her by the swelling of the linseed. The water which swelled the linseed came through the holes made by the ice, which was a peril of the sea.

3. The adjusters were correct in not allowing, in general average, for any damage done to the cargo by water which came through the holes made by the ice. The evidence shows that all the damage done by water to the cargo was done by water which came through those holes. The fact that the water entered through the holes after the determination was made to strand the vessel, has nothing to do with the question.

4. In view of the terms of the average bond, and of the usage of the port of New York, in like cases, as proved, I think the adjusters acted properly in taking, as the contributory value of the freight, one-half of the gross freight agreed to be paid for the voyage on which the disaster occurred.

The principles on which the adjusters proceeded having been correct, I think the evidence fully warrants the results they arrived at.

There must be a judgment, on the verdict, for the plaintiffs.

PETER POILLON vs. JOSEPH SCHMIDT.

The letters patent granted to Peter Poillon, July 21st, 1857, for "means for rendering joints steam-tight," are valid.

The claim of that patent, to "the method, herein described, of causing steam to become a packing to itself, in steam cylinders or other parts of steam machinery, by allowing the steam to act in one or more grooves, substantially as specified," does not claim the use of such grooved surfaces in themselves, or in connection with air, instead of steam.

The patentee having discovered the fact that steam might be made self-packing, when introduced into small grooves in one of two contiguous surfaces not actually in contact with each other, his patent is not invalidated by the fact that air had previously been made self-packing in an air engine by the use of like grooves.

The claim of such patent is a claim to an art or process.

The case of *Le Roy v. Tatham*, (22 Howard, 132,) cited and applied.

(Before BLATCHFORD, J., Southern District of New York, January 30th, 1869.)

THIS was an action at law, for the infringement of letters patent, granted to the plaintiff on the 21st of July, 1857, for a new and useful "means for rendering joints steam-tight." The invention was made by William S. Gale, and assigned to the plaintiff. The specification spoke of the invention as "a substitute for all known means of packing pistons or other steam joints." It consisted of a grooved or a corrugated surface, with an opposing smooth or plain surface. The grooves could be made in the surface of the piston, or in the interior surface of the cylinder, as preferred. The specification described as follows the working of the structure: "The steam, as it is let into the cylinder, rushes in between the piston and cylinder, and fills up the grooves and the intervening space between the piston and cylinder, where it practically forms a complete packing. The steam which fills the grooves and intervenes between the piston and cylinder, also acts as a cushion to partially relieve the piston and cylinder from contact and friction. The grooves may be one or many, at more or less distance apart, more or less wide or deep, and they may

be perpendicular, or more or less oblique to the moving surface and of any sectional form. The best method is to groove one moving surface and leave the opposing surface smooth, to make the grooves thin and frequent, and the corresponding ribs or flanges of the same, or about the same, thickness as the width of the grooves. The grooves need not be deep. From one-quarter to one-half inch will answer. The piston can be of any ordinary size and dimensions now in use, or a trifle larger. It should fit easy, and does not require to be in actual contact with the cylinder. To cut the grooves perpendicular to the axis of the joint, or to the moving surface, and in the sectional form of a parallelogram, is the better way, and sufficient for all purposes, and is the most simple and cheap in construction. See representation in the accompanying drawing. It will be apparent that my grooves and intervening ribs may be used on any joint between two surfaces subject to the operation of steam under pressure, to cause steam to become self-packing. The particular point of my invention and discovery, and its importance, will be perceived from the following. Since the introduction of steam as a motive power, it has always been supposed that two contiguous surfaces could only be rendered steam-tight by actual contact. Hence, every steam engine that has heretofore been made, has depended upon smooth surfaces in contact, or else upon some character of elastic packing that would set steam-tight against its adjacent surface. To accomplish this, great varieties of metallic and other packing have been devised, and vast expenses incurred to make the pistons and other moving joints steam-tight; and this course has heretofore been universally pursued. I believe myself, therefore, to be the original and first inventor or discoverer of the fact that steam, when introduced into small grooves, in one of the contiguous surfaces, will itself form a packing, without said surfaces actually being in contact. I, however, wish it to be understood, that I do not claim the grooved surfaces in themselves, as these have heretofore been used for other purposes, and have been used in connection with air engines." The claim

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was to "the method, herein described, of causing steam to become a packing to itself, in steam cylinders or other parts of steam machinery, by allowing the steam to act in one or more grooves, substantially as specified." The case was tried before the Court without a jury.

Frederick H. Betts, for the plaintiff.

Samuel D. Cozzens, for the defendant.

BLATCHFORD, J. If the patent be valid, the infringement is not denied. The defence is put upon the ground of a want of novelty in the invention. What is adduced to defeat the patent is, a publication in a work in German called the "Schauplatz," published at Weimar, in Germany, in 1847. The text of the publication is accompanied by a drawing, and is this, as translated: "Mr. Cavé uses for his blowing machines a very ingeniously arranged piston, whereby the leather packing becomes unnecessary, which is perfectly air-tight, has no friction, does not become heated, and requires no cost for keeping it in order. This piston consists of a hollow cast-iron ring, which has a diameter about two or three millimeters less than the cylinder, and whose outer surface has the greatest practicable number of annular and square sectioned depressions *a, b, c, d*. If now, for example, a piston arranged in this way goes upward and compresses the air which is found above it, and then this air, in part, presses in between the walls of the cylinder and the outer wall of the piston, having reached *a*, it freely expands, so that it compresses the air therein contained, and then loses for once a part of the force by which it had been pressed in, by which its motion is hindered, and there is opposed to it on the other side, to which it tends to go, a certain resistance. It follows from this, that the air pressed into *a* works backward, one after another, into the grooves *b, c, d*, with a force which constantly decreases, and which, for a sufficient number of grooves, can become zero. Therefore, theoretically considered, the number of grooves must stand in direct proportion to the pressure. Mr.

Cavé has employed these pistons for very many blowing cylinders, and even, too, for one of three metres in diameter. He has made careful experiments with this contrivance, and the results obtained agree in all respects with the theory. An essential condition for the employment of this piston is a perfect centricity of the cylinder, a condition which we can now easily obtain by means of the vertical boring machine."

The first question to be decided is—what is the proper construction of the plaintiff's patent? If it claims merely the arrangement of the grooves in one of the two surfaces, one of the two surfaces being a moving surface, then, undoubtedly, the arrangement of Cavé is an answer to the patent. But the specification says, that the inventor does not claim "the grooved surfaces in themselves." Nor does he claim the use of the grooved surfaces in connection with air, for, the specification states that they have "been used in connection with air engines." The inventor, from the language of his specification, may fairly be said to have had in view the apparatus of Cavé, which used grooved surfaces, in an air engine. He puts his invention, however, on an entirely different point, and claims that, notwithstanding Cavé, he has made a patentable invention. He says that he has discovered the fact that steam may be made to pack in, and of, itself, or to become what he calls "self-packing"; that, prior to his invention, it had always been supposed, ever since steam had been introduced as a motive power, that two contiguous surfaces could be rendered steam-tight only by actual contact; that, consequently, all steam engines had depended, for steam-tight moving joints, on the contact of smooth surfaces, or on elastic packing set steam-tight against its adjacent surface; that, in carrying out this idea, great varieties of packing had been devised at great expense; and that he first discovered the fact that steam, when introduced into small grooves in one of two contiguous surfaces, will itself form a packing without the surfaces being actually in contact. It is not attempted to be shown, on the part of the defence, that these allegations of the specification are not true, otherwise than by introducing

the description and drawing of the Cavé apparatus. But it is insisted, that air, the elastic fluid used in the Cavé apparatus, operated therein in the same manner, in connection with the grooves, as steam, the elastic fluid used in the plaintiff's apparatus, operates therein in connection with the grooves; and that, the grooves and the grooved surfaces being alike in the two, and the air and the steam, as used, being equivalents for each other, there is no patentable novelty in using the grooves in connection with steam, but that it is merely the application of an old apparatus to a new use. Opposed to these suggestions is the fact, that, until this patent was issued, the idea was not promulgated that steam could be made self-packing, and the publication in the "Schauplatz," that air could be made self-packing in an air engine, remained before the world ten years prior to the patenting of Gale's invention, without that being suggested which is now asserted to be so obvious, in view of the apparatus of Cavé. The invention, as set forth in the specification, is a highly meritorious and useful one, and one which a Court will desire to sustain, if consistent with the principles of law.

The claim is to "the method, herein described, of causing steam to become a packing to itself, in steam cylinders, or other parts of steam machinery, by allowing the steam to act in one or more grooves, substantially as specified." It is not possible to mistake the tenor and purport of this claim, when it is read in connection with the rest of the specification. It is a claim to an art or process. It is not a claim to the grooved surfaces. But it is a claim to the process of the self-packing of steam, used in steam machinery, when effected by allowing the steam to act in one or more grooves, as described in the specification. Gale, undoubtedly, was the first to discover that steam could be made to pack itself, and that it could be made to do so by causing it to act in the way described, in one or more grooves. The grooves, used in an air engine were, indeed, old. But it by no means followed, because air would work successfully in the apparatus of Cavé, that steam could be made to pack itself, or to do so by means of grooves, or to do so in the apparatus of Cavé. There was

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room for experiment as to the capability of steam to act in that way, and as to the character of the grooves to be used, and as to what space might or might not be left between the contiguous surfaces. And it does not detract from the novelty or patentability of the invention, that, in carrying it out in practice, the use of grooves like those in Cavé's apparatus was found beneficial. The claim is not to all methods of causing steam to become a packing to itself, in steam machinery, but to the method described in the specification, whereby the property of steam discovered by Gale is made to subserve a useful purpose, by being carried into effect in a practical mode. The newly discovered property of steam, and the practical adaptation of it to a useful end, by the means described, is the invention made and claimed.

It is difficult to distinguish this case from that of the Hanson patent for making lead pipe, which was sustained as a valid patent, by the Supreme Court, in *Le Roy v. Tatham*, (22 *Howard*, 132.) The Hansons discovered that lead, when recently set and solid, but still under heat and extreme pressure, in a close vessel, would reunite perfectly after a separation of its parts. Availing themselves of this property in lead, the inventors succeeded in making by machinery, at a reduced expense, lead pipe of a better quality than had before been known. The claim of the patent was to the combination of machinery employed, "when used to form pipes of metal under heat and pressure, in the manner set forth, or in any other manner substantially the same." The machinery used was shown to be, in principle, substantially the same with machinery which had before been used to make macaroni, and with machinery which had before been used to make clay pipe. The claim was stated by the Court to be a claim to the machinery only when used to form pipes of metal under heat and pressure; and it was sustained by the Court, against the objection that it only claimed the application of an old machine to a new use, or to produce a new result. The claim in the Hanson patent would have been the same, to all intents, if it had claimed the method of causing lead to

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separate and reunite, at a welding heat, under pressure in a close vessel, by the use of the machinery described, to form lead pipe, in the manner set forth. The claim of the Gale patent would be the same, in effect, if it were to claim the arrangement of the grooves, substantially as specified, when used in connection with steam, to cause the steam, by acting in the grooves in the manner described, to become a packing to itself in steam machinery.

I am satisfied that the Gale patent is valid, that the claim is sustainable, that the invention claimed is new and useful, and that the plaintiff is entitled to a verdict for \$50, on the two machines proved to have been used by the defendant, the license fee fixed by the plaintiff being shown to be \$25 on each machine.

GUSTAVUS W. FABER vs. HIRAM BARNEY.

Under the Act of March 3d, 1863, (12 *U. S. Stat. at Large*, 741,) the certificate therein provided for must be applied for in proper season.*

Where, in a suit against a collector of customs, to recover back duties alleged to have been illegally exacted by him, a judgment was recovered against the defendant, and no application for such a certificate was made at the trial, nor until the expiration of nearly two years thereafter, and after a motion was noticed by the plaintiff for execution on the judgment, and such application was then made, on affidavits, before a judge who took no part in the trial: *Held*, that the application ought not to be granted.

(Before BENEDICT, J., Southern District of New York, March 2d, 1869.)

THIS case came before the Court on a motion for an execution to enforce the payment of a judgment. The action was *assumpsit*, for money had and received, brought against the collector of the port of New York, to recover back certain duties alleged to have been illegally exacted by him. It was tried in February, 1867, and a verdict was rendered for the plaintiff, on which a judgment was duly entered against the defendant in April, 1867. Since that time no steps whatever

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had been taken toward moving for a new trial, or bringing a writ of error, nor had the judgment been paid. No certificate of probable cause, or that the moneys in question had been exacted by direction of the Secretary of the Treasury, was given or applied for at the trial, nor had any such application been since made to a judge who was present at the trial. After the motion for execution was made, the defendant coupled with his opposition to the motion an application for a certificate, under the 12th section of the Act of March 3d, 1863, (12 *U. S. Stat. at Large*, 741,) which application was opposed by the plaintiff. The judge now holding the Court was not present at the trial.

Webster & Craig, for the plaintiff.

Simon Towle, for the defendant.

BENEDICT, J. Of the many propositions which were discussed upon the hearing of these motions, I deem it necessary to consider but a single one.

It is conceded that the plaintiff is entitled to his execution, unless the certificate provided for by the 12th section of the Act of March 3d, 1863, (12 *U. S. Stat. at Large*, 741,) be granted; but it is insisted, on the part of the defendant, that the Act of 1863 is mandatory on the Court to grant the certificate whenever applied for, whether the application be made before a judge who tried the cause, or some other judge holding the Court at the time of the application, and that such certificate, when granted, is a final bar to any execution. To this doctrine I do not assent. The Act of March 3d, 1863, although, no doubt, intended to afford a means of protecting a collector from loss, by reason of liabilities assumed by him under the direction of the Secretary of the Treasury, must, if it confers upon a collector an absolute right to a certificate in every case where he has acted under the direction of the Secretary, be considered as implying that the application therefor is to be duly made, and at a proper time.

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In the present case, no application for the certificate was made at the trial, nor until the expiration of nearly two years, and after a special motion for execution is noticed; and it is then made before a judge who took no part in the trial, and upon affidavits. An application for a certificate, under such circumstances, comes too late. The defendant must be deemed to have waived his right to the entry of a certificate, by delaying his application for the space of nearly two years, and until after a motion for execution is noticed, and when the certificate, if it can be granted at all, must be ordered by a judge who took no part in the trial of the cause.

The application of the defendant must, therefore, be dismissed, and, consequently, the application of the plaintiff for an execution is granted.

THE GOLD AND SILVER ORE SEPARATING COMPANY

v8.

THE UNITED STATES DISINTEGRATING ORE COMPANY, AND
MELCHOR B. MASON.

Exercise of the jurisdiction, under the 16th section of the Act of July 4th, 1836, (5 *U. S. Stat. at Large*, 123,) to declare void one of two interfering patents.

What averments, in an answer to a bill filed to have a patent declared void, in the exercise of such jurisdiction, constitute an admission that the two patents which are claimed to interfere, cover and claim, in whole or in part, the same inventions.

Two patents interfere, within the meaning of the said 16th section, only when they claim, in whole or in part, the same invention.

The first claim of the reissued patent No. 1,988, granted June 6th, 1865, to the Hagan Manufacturing Company and William E. Hagan, as assignees, on the invention of said Hagan, for an "improvement in furnaces for treating ores by superheated steam," the original patent having been granted to John B. Gale, as assignee of said Hagan, March 8th, 1864, and the first claim of the patents granted January 3d, 1865, to C. V. De Forest, Amos Howes, and George E. Van Derburgh, as assignees, on the invention of Melchor B. Mason, for an "improved method of desulphurizing and oxydizing metallic ores," interfere with each other, in the sense of the said 16th section.

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The said claims examined and explained, in reference to such interference.

As between Hagan and Mason, Hagan was the first inventor of the process claimed by each of the two patents.

A decree made adjudging the Mason patent void, so far as the process therein described for oxydizing ores employs superheated steam in the manner described in the Hagan patent.

(Before BLATCHFORD, J., Southern District of New York, March 8th, 1869.)

THIS was a final hearing, on pleadings and proofs. On the 8th of March, 1864, letters patent were granted to John B. Gale, as assignee of William E. Hagan, for an "improvement in stoves." On the 6th of June, 1865, this patent was surrendered, and reissued, in two separate reissues, to the Hagan Manufacturing Company and William E. Hagan, as assignees, by mesne assignments, of William E. Hagan. One of the two, No. 1,988, was for an "improvement in furnaces for treating ores by superheated steam." On the 3d of January, 1865, letters patent No. 45,803 were granted to C. V. De Forest, Amos Howes, and George E. Van Derburgh, as assignees of Melchor B. Mason, for an "improved method of desulphurizing and oxydizing metallic ores." At the time of the bringing of this suit, the legal title to the said reissue No 1,988, was vested in the plaintiffs, and the legal title to the said patent No. 45,803, for the territories of Nevada, Idaho, and Montana, was vested in the defendant Mason, and, for the rest of the United States, in the other defendants.

The bill alleged, that Hagan was the original and first inventor of the improvements claimed in said reissue No. 1,988; that the invention claimed therein was identical with that covered by said patent No. 45,803; that it was necessary, for the protection of the rights of the plaintiffs, that this Court should determine whether Hagan was such original and first inventor; and that the said patent No. 45,803 was invalid, and should be adjudged void. The bill prayed that the said patent No. 45,803 might be adjudged to be void. The answer set up, that the original patent to Gale was not for the same invention as that patented by said patent No. 45,803; that the inventions patented by said last-named patent were

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not known prior to the invention thereof by said Mason; that the said reissue No. 1,988 was procured for the purpose of fraudulently covering the inventions so made by Mason and patented, and was fraudulent and void; that it was not for the same invention as was the original patent, and was not limited to what was described or made known in the original, or by any filed model which belonged to the application for the original, but was broader than the invention described in the original, and fraudulently covered inventions not described in the original, or represented by any model deposited in the Patent Office on the application for the original, and fraudulently covered inventions of which Hagan had no knowledge at the time he applied for and obtained the original, and inventions of which Hagan was not the first inventor, and not the original inventor, and of which he knew nothing until he had learned them from the invention of Mason, and inventions which he did not intend to patent by the original, and was expanded beyond any invention described in the original, for the fraudulent purpose of covering improvements of which Mason was the first inventor; that the inventions covered by the said patent No. 45,803, and the inventions sought to be claimed by the said reissue No. 1,988, were made and used by Mason long before any invention thereof by Hagan, or any other person; and that the said patent No. 45,803 was valid. The answer prayed that the Court would decree that the said reissue No. 1,988 was void, and that the said patent No. 45,803 was valid.

Charles M. Keller, for the plaintiffs.

George Gifford, for the defendants.

BLATCHFORD, J. The jurisdiction invoked by the plaintiffs in this case is that conferred by the 16th section of the Act of July 4th, 1836, (5 *U. S. Stat. at Large*, 123,) which provides, that, "whenever there shall be two interfering patents, * * * any person interested in any such patent,

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either by assignment or otherwise, * * * may have remedy by bill in equity, and the Court having cognizance thereof, on notice to adverse parties, and other due proceedings had, may adjudge and declare either the patents void in the whole or in part, or inoperative and invalid in any particular part or portion of the United States, according to the interest which the parties to such suit may possess in the patent, or the inventions patented, * * * as the fact of priority of right or invention shall in any such case be made to appear."

The first question to be determined is, whether the reissue No. 1,988, and the patent No. 45,803, are, within this 16th section, "interfering patents." A considerable portion of the argument of the counsel for the defendants was devoted to maintaining the point, that the two patents do not, in whole or in part, claim the same thing, and that, therefore, they do not interfere. But no such point is taken in the answer. The bill avers, substantially, that the inventions covered by the two patents are identical. The answer, while it avers that the invention covered by the original patent to Gale was not for the same invention as the patent No. 45,803, nowhere alleges that the reissue No. 1,988 and the patent No. 45,803 do not claim and cover the same inventions. On the contrary, the answer avers, in substance, that the two do cover and claim the same inventions. It states that the original patent to Gale was reissued for the purpose of covering the inventions patented by the patent No. 45,803; that the reissue No. 1,988 was expanded beyond any invention described in the original, for the purpose of covering improvements of which Mason was the inventor; and that the inventions covered by the patent No. 45,803, and those sought to be claimed by the reissue No. 1,988, were made by Mason long before any invention thereof by Hagan or any other person. If these averments in the answer do not constitute an admission that the two patents, which are claimed to interfere, cover and claim, in whole or in part, the same inventions, they have no meaning. Two patents interfere, within the meaning of

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the 16th section, only when they claim, in whole or in part, the same invention. The interference intended is of the same character with that spoken of in the 8th section of the same Act, which refers to an interference between two pending applications for patents, and to one between a pending application for a patent and an unexpired patent previously granted, and with that mentioned in the 12th section of the same Act, which refers to an interference between two applications where "the specifications of claim interfere with each other."

Independently, however, of any admission in the answer, there can be no doubt that the two patents in question do interfere with each other, in the sense thus defined.

The claims of the reissue No. 1,988 are three in number: (1.) The employment or application of superheated steam, in the manner as, or substantially as, described and set forth, for the purpose of refining or reducing metals, and for the removal of sulphur, arsenic, phosphorus, or other impurities, from ores or minerals; (2.) The employment or application of superheated steam, as, or substantially as, described, for the purpose of calcining and disintegrating quartz rock containing silver, gold, or other metals; (3.) The employment or application of superheated steam for the refining of iron, and for the converting of iron into semi or pure steel, in the manner substantially as described and set forth.

The patent No. 45,803 contains two claims: (1.) The improved process of Mason for removing sulphur, arsenic, phosphorus, and antimony, from auriferous, argentiferous, or other metallic ores, and for oxydizing the said ores, by treating them with hydrogen and carbonic acid gases, substantially in the manner set forth; (2.) As a part of the improved process of Mason, the admission of steam into the chamber wherein the metallic ores are heated, desulphurized and oxidized, substantially in the manner and for the purpose set forth.

It is impossible not to say that there is an identity, in substance, between the first claim of the reissue No. 1,988, and the first claim of the patent No. 45,803. The former claims

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the employment of superheated steam, in the manner described, to refine or reduce metals, and to remove sulphur, arsenic, phosphorus, or other impurities—from ores or minerals. The latter claims the process of Mason for removing sulphur, arsenic, phosphorus, and antimony, from metallic ores, and for oxydizing such ores, by heating them with hydrogen and carbonic acid gases, as set forth.

The manner described in the reissue No. 1,988, in which superheated steam is employed to refine or reduce metals, and to remove impurities from ores or minerals, is to discharge superheated steam directly into the body of a fire, so that the highly rarified aqueous vapor shall impinge upon, and be brought in contact with, the incandescent fuel, without admixture of atmospheric air, while, at the same time, combustion is supported in part by the admission of air to the fire by way of draft. The specification states, that, when superheated steam, without admixture of atmospheric air, is caused to impinge directly upon ignited carbon, it undergoes decomposition into hydrogen and oxygen; that, if a reverberating furnace is properly arranged in connection with the fire chamber of such furnace, and mineral ores are placed on the bed of the furnace, and superheated steam is thus introduced into the fire and decomposed, and the liberated hydrogen is thrown in amongst such ores, it will, by its affinity for sulphur, phosphorus, and other volatile substances, in the ores, carry them off in a gaseous form, and, by the combined action of the heat and the hydrogen, the ores will be thoroughly disintegrated and purified, so that they can be crushed with facility. Adequate mechanical means for conducting these operations are described in the specification.

The process of Mason, described in the patent No. 45,803, for removing impurities from metallic ores, and for oxydizing such ores by treating them with hydrogen and carbonic acid gases, is to arrange a furnace with a chamber for the ores, in connection with a chamber to generate the gases. This last chamber is a chamber of combustion, and the specification states, that superheated steam is to be allowed to escape into

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the fire in fine jets; that the steam will be decomposed, and the hydrogen in it be liberated, while carbonic acid gas will also be generated, from the fact that a current of atmospheric air is admitted to support combustion; and that the hydrogen and carbonic acid gases will pass into the reducing chamber, and permeate and heat the ores, carrying off the impurities, and desulphurizing and oxydizing the ores. Proper means are described for effecting these results.

The processes in the two specifications are identical, and the first claim in each patent embraces, in effect, a claim to the process of decomposing superheated steam, by so introducing it into the fire that it shall be decomposed, while combustion is supported in part by a current of atmospheric air, and of then throwing the resulting gases which are generated, upon ores, metals, and minerals, to produce such effect as such gases will produce in the way of refining, purifying, and reducing, and working such other chemical changes as must inevitably follow from the contact of such heated gases with the articles so subjected to their action. The first claim of the patent No. 45,803 must, therefore, be held to interfere with the first claim of the reissue No. 1,988.

I do not perceive that the second claim of the patent No. 45,803 interferes with any claim in the reissue No. 1,988. That claim embraces merely the admission of steam into the reducing chamber where the ores are heated, desulphurized, and oxydized, so as to prevent excessive heat, and control and regulate the temperature, and avoid the fusion of the sulphurets which are disengaged from the ores in the process.

The next subject of inquiry is, whether Hagan or Mason was the first inventor of the process which is claimed by each of the two patents. Hagan's evidence rests very much upon two caveats filed by him in the Patent Office, one on the 3d of February, 1862, and the other on the 28th of February, 1862. The first caveat, which was accompanied by drawings, describes a fire-box; the admission of air thereto; and the introduction of jets of highly heated steam directly into the ignited fuel. It also refers to the fact, that hydrogen and

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oxide of carbon, and other combustible gases, are evolved in the process. The second caveat states that the steam, admitted in proper quantity to contact with incandescent carbon, will be decomposed; that the intent of the invention is the production of hydrogen and its combustion in a nascent state; and that the objects sought to be attained are economy in heating and warming, the prevention and combustion of smoke, and the deoxydation and desulphurization of mineral ores. Hagan satisfactorily carries back to December, 1858, his invention of applying jets of superheated steam directly to incandescent fuel, unmixed with atmospheric air, but in combination with the application of a draft of atmospheric air to the fuel. He also satisfactorily carries back to January, 1862, his application of the gases evolved by such plan of combustion to metallic ores, for the purpose of desulphurizing them, resulting in their complete desulphurization and disintegration. The apparatus and the process thus used by Hagan were the same as those described in the reissue No. 1,988. That Hagan intended to claim, in the original patent, the specification of which was signed by him, the invention covered by the first claim in the reissue No. 1,988, can admit of no doubt; and that that reissue, so far as the first claim in it is concerned, is for the same invention intended by Hagan to have been patented by the original patent, and was a proper and valid reissue, is equally clear. It is useless to go over the proofs on that subject, as they are uncontradicted, and all tend to the conclusions stated.

The evidence on the part of the defendants, if it tends to show that Mason did any thing, prior to his being brought into communication with Hagan, beyond attempting to desulphurize and disintegrate ores by throwing superheated steam into the ore chamber without first decomposing it in the fire chamber, does not go to prove any thing but abortive, inconclusive, and unpractical experiments on the part of Mason, down to a period as late as August, 1864, in decomposing superheated steam, and applying the gases generated in the process to the purification and reduction of ores. The weight

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of the evidence is very preponderating that Mason borrowed directly from Hagan all that is embodied in the first claim of the patent No. 45,803.

The allegation in the answer, that Hagan was not the first inventor of what is claimed in the reissue No. 1,988, is not sustained by the evidence, so far as respects the particulars in which the reissue No. 1,988 and the patent No. 45,803 are held to interfere, either as regards a prior invention thereof by Mason or otherwise.

The prayer of the answer, that the reissue No. 1,988 may be decreed to be void, and that the patent No. 45,803 may be decreed to be valid, must be denied; and there must be a decree adjudging the patent No. 45,803 to be void, so far as the improved, process of the defendant Mason, therein described, for removing sulphur, arsenic, phosphorus, and antimony, from auriferous, argentiferous, and other metallic ores, and for oxydizing the said ores, by treating them with hydrogen and carbonic acid gases, substantially in the manner set forth in said patent No. 45,803, employs or applies superheated steam in the manner as, or substantially as, described in the said reissue No. 1,988.

The defendants must be charged with the costs of the suit.

FRANCOIS M. BIXBY, SURVIVOR OF HUMPHREY & Co.

v8.

GERHARD JANSSEN, LEOPOLD SCHMIDT AND OTHERS, COMPOS-
ING THE FIRM OF JANSSEN, SCHMIDT & RUPERTI.

Where an action on contract was brought in this Court against the persons composing a firm, and the jurisdiction of the Court depended wholly on the fact that one of the defendants was a consul in the United States for a foreign power, and it was held that the firm was not liable, but that one of the defendants, other than the consul, was liable, with two other persons, who com-

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posed, with him, a former firm: *Held*, that this Court had no jurisdiction to give judgment against such defendant.

(Before BLATCHFORD, J., Southern District of New York, March 13th, 1869.)

THIS was an action on contract, tried before the Court without a jury.

Spaulding & Richardson, for the plaintiff.

Henry D. Lapaugh, for the defendants.

BLATCHFORD, J. I do not think, on the evidence, that the firm of Janssen, Schmidt & Ruperti is liable to the plaintiff for the claim sued for. I think, however, that the persons who composed the former firm of J. W. Schmidt & Co., on the 23d of February, 1865, are liable for it. Those persons were John W. Schmidt, Edward Vonderheydt, and the defendant Janssen. The defendant Schmidt, who is consul in the United States for the kingdom of Saxony, was not a member of the firm of J. W. Schmidt & Co. on the 23d of February, 1865. He became such in March, 1865. It is only by reason of his being a foreign consul that this Court has any jurisdiction of this action. The defendant Janssen was a member of the firm of J. W. Schmidt & Co. on the 23d of February, 1865, and, as such, is liable to the plaintiff for the claim sued for, according to the written memorandum of that date; but, as the firm of Janssen, Schmidt & Ruperti, as a firm, is not liable for the claim, and there can be no recovery in this suit against the defendant Schmidt, the consul, the jurisdiction of the Court to give judgment against Janssen fails, he having been properly sued in this Court only as a copartner with the defendant Schmidt, and being, in fact, sued only as a member of the firm of Janssen, Schmidt & Ruperti, and his liability as such copartner not being established. Janssen, though liable, as a member of the firm of J. W. Schmidt & Co. on the 23d of February, 1865, for this claim, must be sued for it in a State Court.

I, therefore, find for the defendants.

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FRANCISCO HERNANDEZ AND JUAN PEDRO HERNANDEZ

v8.

THE SUN MUTUAL INSURANCE COMPANY.

In this case, which was a suit on a policy of marine insurance on boxes of lemons, a valuation of the lemons, by the policy, at so much per box, was held not to make the insurance an insurance on each box of the lemons, when it was otherwise a single contract of insurance on the entire number of boxes of lemons named in the policy, and not an insurance against the loss of any portion of the boxes less than the whole.

The case of *Nedlin v. Insurance Company*, (20 *Pennsylvania R.*, 312,) cited and approved.

All the words of a policy, the written ones and the printed ones, must be taken together, and, where there is a contradiction between them, the former must control.

The printed words of a policy, insuring against loss of the goods insured, "or any part thereof," commented on.

Those printed words do not control the printed words in the memorandum clause, "free from average, unless general."

(Before BLATCHFORD, J., Southern District of New York, March 19th, 1869.)

THIS was an action on a policy of marine insurance, made by the defendants, October 10th, 1867, insuring for the plaintiffs, in the written words of the policy, "fourteen thousand three hundred dollars on 6,000 boxes lemons, free of particular average, but liable for loss of part by jettison—thirty-eight hundred dollars on 4,000 boxes raisins, subject to ten (10) per cent. average"—by the steamer Amsterdam, from Malaga to New York. The policy also contained, in writing, the words, "raisins valued at 1.90c. per box, in wholes; halves, and quarter boxes in proportion; lemons at \$4.25, gold, per box." The premium was stated in writing in the policy, as follows: "one and one-fourth per cent. on lemons; one and one-half per cent. on raisins; less fifteen per cent. in lieu of scrip."

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The policy also contained the written words: "\$18,100, eighteen thousand one hundred dollars, gold," and the written words, "premium payable in gold." It also contained the printed words, "loss, if any, to be paid in gold;" and, after the written descriptive clause and the written valuation clause, above quoted, printed words to the effect that the insurance was against perils to the damage "of the said goods and merchandise, or any part thereof;" and, after the said two written clauses, and the written premium clause, above quoted, the printed words, "but no partial loss or particular average, shall, in any case, be paid, unless amounting to five per cent.; provided always, and it is hereby further agreed, that if the said assured shall have made any other assurance upon the premises aforesaid, prior in date to this policy, then the said Sun Mutual Insurance Company shall be answerable only for so much as the amount of such prior assurance may be deficient towards fully covering the premises hereby assured, and the said Sun Mutual Insurance Company shall return the premium upon so much of the sum by them assured as they shall be, by such prior assurance, exonerated from." The printed memorandum clause in the policy contained these words: "It is also agreed that * * * fruits (whether preserved or otherwise) * * * are warranted by the assured free from average, unless general." On the back of this policy were endorsed, in writing, these words: "October 7th, 1867. Thirteen hundred and sixty dollars, gold, on almonds, and ten hundred and sixty-two dollars, gold, on lemons, valued at sum insured, per steamer Amsterdam, at and from Malaga to New York. Almonds subject to ten (10) per cent. average. Lemons free of particular average; otherwise, conditions as within. Loss payable to them. On 170 bales almonds, \$1,360, valued at \$8, gold, per package. On 250 boxes lemons, \$1,062, valued at \$4.25, gold, per box. One and one half per cent, less 15 per cent., in lieu of scrip. \$2,422, twenty-four hundred and twenty-two dollars, at 1½ per cent., \$36.33. Premium payable in gold."

On the 13th of September, 1867, the plaintiffs shipped

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on board of the steamer Amsterdam, at Malaga, for New York, 6,250 boxes of lemons, 6,000 of them being those named in the body of the policy, and 250 of them being those named in the endorsement. The steamer sailed from Malaga on the 22d of September, 1867, and, on the 20th of October, 1867, while on her voyage to New York, she was stranded and totally lost, near Montauk Point, Long Island. Of the 6,250 boxes of lemons insured, 4,071 were saved and delivered in a sound condition, except that a small portion thereof were partially damaged; and there was a physical loss and destruction of the remaining 2,179 boxes, (namely, 2,024 of the 6,000 insured by the body of the policy, and 155 of the 250 insured by the endorsement,) in consequence of the breaking up and destruction of the steamer before they could be got out. The plaintiffs had an insurance on the said 6,000 boxes of lemons, and on the said 4,000 boxes of raisins, in the New York Mutual Insurance Company, which was effected on the 27th of September, 1867, as follows: "\$2,800 on 4,000 boxes raisins, in wholes, $\frac{1}{2}$ s and qrs., vald. a. 1.90c. ea., \$7,600—\$11,200 on 6,000 boxes of lemons, a. \$4.25 ea., \$25,500. Gold. Raisins subject to 10 per cent. average. Lemons free of particular average, but liable for any portion thrown overboard." The insured value of the 2,179 boxes which were lost amounted to \$9,260.75 in gold, and the proportion thereof payable by the defendants, if they were liable for such loss, was \$5,482.62, in gold. Evidence of the foregoing facts being given at the trial, a verdict was taken, by consent, for the plaintiffs, for \$7,736.19, being the amount of the said \$5,482.62, in currency, and with interest thereon to the date of the trial, subject to the opinion of the Court on a case.

Edward H. Owen and Stephen P. Nash, for the plaintiffs.

Joseph H. Choate, for the defendants.

BLATCHFORD, J. No claim is made in this suit as to the

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- raisins. The sole question is as to the 2,179 boxes of lemons. It is contended, on the part of the plaintiffs, that the body of the policy is not a single contract of insurance on 6,000 boxes of lemons, and that the endorsement is not a single contract of insurance on 250 boxes of lemons, but that the body of the policy contains a separate insurance on each box of the 6,000 boxes named in it, and that the endorsement contains a separate insurance on each box of the 250 boxes named in it. Under the printed memorandum clause in the policy, these lemons, being fruits, and being warranted by the assured, by such clause, free from average, unless general, if the 6,000 boxes were insured in gross by the body of the policy, and the 250 boxes were insured in gross by the endorsement, the defendants would not be liable for the two several lots of 2,024 boxes and 155 boxes, physically totally lost, others of each of the two lots having been saved. But the plaintiffs rely on the written portions of the policy and of the endorsement, to take the case out of the general rule of law, and to show that the insurance was not of the 6,000 boxes in gross, and of the 250 boxes in gross. So much of the written portion of the body of the policy as describes the subject insured, and the amount of risk taken, states nothing except that \$14,300 is insured on 6,000 boxes of lemons, with the words added, "free of particular average, but liable for loss of part by jettison." So much of the written portion of the endorsement as describes the subject insured, and the amount of risk taken, states nothing except that \$1,062 is insured on 250 boxes of lemons, with the words added, "free of particular average; otherwise, conditions as within." These insurances can mean only, that 6,000 boxes of lemons are insured in one lot, and 250 boxes of lemons are insured in another lot, each lot free of particular average, except that if any part of either lot, that is, any number of boxes in either lot, is lost by jettison, the insurer is to be liable therefor. The words "free of particular average," written in, in both the body of the policy and the endorsement, as to the lemons, mean the same thing, and are to the

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same effect as the words "free from average, unless general," in the printed memorandum clause, in regard to the lemons, as fruits, and import that the contract is, that the insurer is to be liable for no loss of any part of the 6,000 boxes less than the whole, or any part of the 250 boxes less than the whole. It is specially provided, however, that the insurer shall be liable for a loss by jettison of a less number of the 6,000 boxes than the whole, and of a less number of the 250 boxes than the whole. But for such special provision, the words, "free of particular average," would apply as well to a loss by jettison as to any other loss. Thus far, then, there would seem to be no room for controversy as to the terms of the contract, and nothing to indicate an intention, by either party, to have an insurance made on any portion of the 6,000 boxes less than the whole, or any portion of the 250 boxes less than the whole, in regard to any loss, except a loss by jettison.

What, then, is there in any other part of the contract to indicate any different intention? The clause solely relied on by the plaintiffs, to show such different intention, is the written valuation clause, in the body of the policy, and also in the endorsement, valuing the lemons at \$4.25 per box. They claim that such valuation clause indicates that the insurance was distributive, and on each box of lemons, while they do not contend that the fact that the lemons were contained in separate boxes, was alone sufficient to create a separate insurance on each box. Reasoning on principle, it would hardly answer to admit the valuation of each box in this case as conclusive evidence of an intention to insure each box separately; and that is what must be done if the claim of the plaintiffs is allowed. Other reasons occur why a valuation of each box of lemons, as well as a valuation of each box, each half box, and each quarter box of raisins, and of each bale of almonds, may have been inserted. The property was shipped on the 13th of September, at Malaga, the vessel sailed from Malaga on the 22d of September, and the insurances were effected on the 7th and 10th of October. The valuation of

each separate package may very well have been inserted with a view to calculating the return premium, in case it should turn out that less than 6,250 boxes of lemons, or less than the specified number of packages of raisins and almonds, had been shipped, or the return premium provided for in case of the existence of a prior insurance on the property, and which prior insurance, as appears from the evidence, in fact existed in this case. So, also, in case of a loss by jettison of some of the boxes of lemons, the valuation of each box of lemons was important, to fix the measure of the insurer's liability. The valuation did not correspond with the sum insured, as to the body of the policy, in respect to either of the articles insured; and, therefore, the valuation, per box, of the lemons and the raisins insured by the body of the policy, could not be arrived at by dividing the sum insured by the total number of boxes. The valuation of the 6,000 boxes of lemons, at \$4.25 per box, was \$25,500, while the sum insured thereon was \$14,300; and, if the sum so insured had been taken as the valuation, in the absence of the valuation at \$4.25 per box, it would have given a valuation of \$2.38 per box. The valuation of the 4,000 boxes of raisins, at \$1.90 per box, was \$7,600, while the sum insured thereon was \$3,800, which sum, if taken as the valuation, would, in the absence of the valuation at \$1.90 per box, have given a valuation of 95 cents per box.

Moreover, the view urged on the part of the plaintiffs, leads to some results which it is impossible to believe could have been contemplated by the parties. The insurance, if distributive, and on each package, must have been made on each quarter box of raisins; that is, on each forty-seven and a half cents' worth of raisins. The insurance on the raisins is made "subject to ten *per cent.* average." By that, the insurer was not liable for any partial loss of any *quantum* of raisins insured, unless such loss should amount to ten *per cent.* of the value of such *quantum*, but the insurer was to be liable for such partial loss, if it should amount to such ten *per cent.* Now, if forty-seven and a half cents' worth of raisins was separately insured, the insurer was made liable for a loss

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amounting to as little as four cents and three-quarters. With a printed memorandum clause such as is found in this policy, it requires clear and definite language to make a contract which shall take these fruits so wholly out of that clause, and out of the freedom from particular average therein stipulated, as to require a separate average on each one of a quantity of small packages, each valued at not more than forty-seven and a half cents. In regard to a loss of lemons by jettison, where the entire package would be thrown overboard, and presumably lost as a totality, the contract is clear; and the expression of a liability for a loss of part by jettison, excludes the idea that the insurer was to be liable for a loss of part by any other peril, especially in connection with the written clause, "free of particular average," and the like clause in the printed memorandum, in regard to the lemons.

Again, if each box of lemons was separately insured, there would necessarily be a liability of the insurer for each box jettisoned, without the insertion of the written clause, "but liable for loss of part by jettison." Such words would, in that case, be wholly useless; unless, indeed, each box being insured, the jettison of a part means the throwing overboard of some lemons out of a box—a construction hardly worthy of being advanced in a Court of justice.

By the policy, the premiums on the lemons and the raisins severally would seem to have been adjusted with reference to the risk taken. The premium is $1\frac{1}{4}$ *per cent.* on lemons, and $1\frac{1}{2}$ *per cent.* on raisins, both being fruits, and both in boxes. Thus a higher premium was charged on raisins. This was natural, on the view urged by the defendants. They insured the lemons, free from particular average, or partial loss, except that they were to pay for the loss of part by jettison; but, in regard to the raisins, they were to pay for a partial loss, provided it amounted to ten *per cent.* of the value of the raisins insured. This warranted a higher premium on the raisins, the risk being greater. On the view urged by the plaintiffs, however, the risk as to the lemons would be greater than the risk as to the raisins; for, while each box of each article would

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be insured separately, the raisins would be subject to ten *per cent.* average, while the lemons would not be, and yet the raisins would have paid one-quarter of one *per cent.* more premium.

The case of *Newlin v. Insurance Company* (20 *Pennsylvania R.*, 312) is directly in point against the plaintiffs, and no case directly in their favor has been referred to. On principle, the reasoning of the Supreme Court of Pennsylvania, in that case, is sound, and shows that such a valuation as is found in the policy in this case, cannot be construed as creating a separate insurance on each package so valued, in view of the language of the other portions of the policy. I have no doubt that this is the view generally held by assurers and assured, in practical business, and acted on daily, and it is so far a rule of property, that I am not willing to disturb it until so directed by superior authority.

The fact urged, that the printed portion of the policy insures against loss "of the said goods and merchandise, or any part thereof," cannot control the case. The whole policy, written words and printed words, must be taken together; and, where there is a contradiction between the written words and the printed words, the former must control. (2 *Parsons' Maritime Law*, book 2, chap. 1, p. 53.) It is the settled law of this Court, under a policy like the present one, containing, respecting the lemons, the printed words, in the memorandum clause, "free from average, unless general," and also the written words, "free of particular average," that the insurer is free from all partial losses of every kind, which do not arise from a contribution towards a general average. (*Biays v. Chesapeake Ins. Co.*, 7 *Cranch*, 415; *Morean v. The U. S. Ins. Co.*, 1 *Wheaton*, 219.) Yet, the claim on the part of the plaintiffs is, that by the printed words, "or any part thereof," the insurer is made liable for all partial losses of every kind. This is wholly contradictory of the written words as to the lemons, "free of particular average," and the latter must control. These words, "or any part thereof," are equally applicable, if capable of the construction insisted on by the plaintiffs, to the

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insurance, which they insist was made, of each separate box of the lemons; and then these words would effect an insurance of each separate lemon, which the plaintiffs would hardly contend for. These words, "or any part thereof," in the printed blank form of a marine policy, have coexisted, for a long time, with the printed words in the memorandum clause, "free from average, unless general," (1 *Arnould on Insurance*, 2d. ed., by *Perkins*, p. 21,) and yet it has never been supposed that the former control the latter. Under the rule as to the construction of contracts, that, where one portion of a contract is wholly repugnant to the rest of it, and is irreconcilable with the manifest intention of the parties, as apparent upon a consideration of the whole instrument, it will be stricken out, (*Story on Contracts*, chap. 20, § 660,) the former words would, in the present policy, be stricken out. It was said by Chief Justice Marshall, in *Yeaton v. Fry*, (5 *Cranch*, 335, 342,) in regard to policies of marine insurance, that they "are generally the most informal instruments which are brought into Courts of justice;" and in regard to a marine policy, he also said, in *Maryland Ins. Co. v. Woods*, (6 *Cranch*, 29, 45:) "The contract of insurance is certainly very loosely drawn, and a settled construction, different from the natural import of the words, is given, by the commercial world, to many of its stipulations, which construction has been sanctioned by the decisions of Courts." The remark of Mr. Justice Buller, made in 1791; in *Brough v. Whitmore*, (4 *T. R.*, 206, 210,) in regard to a policy of insurance, that it "has at all times been considered, in Courts of law, as an absurd and incoherent instrument, but it is founded on usage, and must be governed and construed by usage," is as true now as it was then. It cannot be seriously contended, that any such construction is given, by the commercial world, or by assurers or assured, or in usage, or by Courts of justice, to these ancient, formal, printed words, "or any part thereof," as is contended for by the plaintiffs.

There must be a judgment for the defendants.

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FRANCISCO HERNANDEZ AND JUAN PEDRO HERNANDEZ

vs.

THE NEW YORK MUTUAL INSURANCE COMPANY.

The case of *Hernandez v. The Sun Mutual Ins Co.*, (*ante*, p. 317,) affirmed.

It makes no difference, on the question as to whether a policy insures against the loss of 6,000 boxes of lemons as a whole, or against the loss of each separate box, whether the policy, after naming the valuation of the lemons per box, does or does not name the total valuation, at that rate, of the 6,000 boxes.

(Before BLATCHFORD, J., Southern District of New York, March 19th, 1869.)

THIS was an action on a policy of marine insurance. The facts in the case differed from those in the case of the same plaintiffs against the Sun Mutual Insurance Company, (*ante*, p. 317,) in particulars wholly unimportant. The insurance in this case was—" \$3,800, on 4,000 boxes raisins, in wholes, $\frac{1}{2}$ s., and qrs., vald. 190c. ea., \$7,600; \$11,200, on 6,000 boxes lemons, @ \$4.25 ea., \$25,500. Gold. Raisins subject to ten *per cent.* average. Lemons free of particular average, but liable for any portion thrown overboard—" by the same vessel, from Malaga to New York. It was made September 27th, 1867. In all other particulars than those above mentioned, the two policies were substantially alike. There was no indorsement on the policy in this case. Of the 6,250 boxes of lemons which the vessel had on board, 6,000 were those insured by the policy in this case. Of such 6,000 boxes, 3,976 were saved, and delivered in a sound condition, except that a small portion thereof were partially damaged, and there was a physical total loss and destruction of the remaining 2,024 boxes, in consequence of the breaking up and destruction of the vessel before they could be got out. The fact of the subsequent insurance made by the Sun Mutual Insurance Company on said 6,000 boxes of lemons, and on 4,000 boxes of

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raisins, as set forth in the report of the case against the latter company, was proved at the trial. The insured value of the 2,024 boxes of lemons which were lost, amounted to \$8,602, in gold, and the proportion thereof payable by the defendants, if they were liable for such loss, was \$3,778.13, in gold. At the trial, a verdict was taken, by consent, for the plaintiffs, for \$5,318.89, being the amount of the said \$3,778.13, in currency, and with interest thereon to the date of the trial, subject to the opinion of the Court, on a case.

Edward H. Owen and *Stephen P. Nash*, for the plaintiffs.

Richard S. Emmet, for the defendants.

BLATCHFORD, J. The written words in this case, "liable for any portion thrown overboard," have no legal meaning or effect different from the words, "liable for loss of part by jettison;" and the mode of describing the valuation of the lemons and raisins in the policy in this case, is not different, in substance, from that found in the policy in the other case. All the considerations commented on in the opinion in that case have equal application in this case, except the one as to the provision for a return of premium in case of a prior insurance, the insurance in this case being the prior one. The valuation in the policy in this case, after naming the valuation per box, carries out the total valuation, which was not done in the other case, but such total valuation, and such valuation per box, are equally parts of the valuation, and the putting in of the total valuation can make no difference as to the effect of the valuation per box on the question of a separate insurance of each box.

The defendants, at the trial, offered in evidence the written applications made by the plaintiffs to the defendants for the insurance made in this case, but they were excluded by the Court. As the judgment will be for the defendants, the point is unimportant.

Judgment for defendants.

THE TROY IRON AND NAIL FACTORY

vs.

ERASTUS CORNING, JAMES HORNER, AND JOHN F. WINSLOW.
IN EQUITY.

An exception should always be taken on the spot to each ruling of a Master which a party intends to contest. It need not then be drawn up in form, but it should be taken, by giving notice to the Master, and it is his duty to note the fact in his minutes.

Where a Master admits evidence that is objected to, and reserves the questions arising on the objection, and afterward omits to pass on the objection, or decides upon it in a manner claimed to be incorrect, the first opportunity should be taken to except to his omission or alleged error in such particular.

The serving of the draft report of the Master, and the filing of objections thereto, is such opportunity, and, if such objections do not embrace such exceptions, it is too late to take such exceptions by way of exception to the final report of the Master.

If it is proper to except at all to the final report of a Master, for rulings admitting or rejecting evidence, this can only be done where objections of the same kind have been made to the draft report.

It is somewhat doubtful, whether, strictly, any exceptions to the Master's rulings on the admission or rejection of evidence, can be properly embraced in exceptions to the Master's final report.

Reasons for applying the rule strictly in this case, and for overruling exceptions taken to the final report of the Master, in respect of rulings made by him as to the admission and rejection of evidence.

Effect of an admission made in an answer, that the defendants had made "large profits" by the use of machinery alleged to infringe the plaintiffs' patent, upon the question of the amount of nett profits derived from such infringement, on an accounting before a Master under a decree.

Effect of letters written by the defendants to their customers, on the same question.

Consideration of the expenses and charges proper to be allowed to the defendants, in ascertaining such nett profits.

The true amount of the nett profit derived from using machinery, in infringement of a patent, to make articles which are sold, cannot be determined, without deducting from the value of the articles made and sold all the elements of cost in their production.

(Before NELSON and SHIPMAN, JJ., Northern District of New York, March 25th. 1869.)



THIS was a bill in equity, praying for an injunction and an account. It was filed July 10th, 1848. The answer was sworn to March 1st, 1849. The object of the suit was to restrain the defendants from using a certain improvement in machinery for making hook or brad-headed spikes, for which a patent was granted to Henry Burden, September 2d, 1840, which he assigned to the plaintiffs; and to compel the defendants to account to them for the profits alleged to have been made by the defendants in the course of their unauthorized use of this patented improvement. The case was brought to hearing before this Court, and, in March, 1850, a decree was rendered dismissing the bill. (1 *Blatchf. C. C. R.*, 467.) On appeal to the Supreme Court, the decree below was reversed, at the December Term, 1852, (14 *Howard*, 193,) and the case was remanded to this Court, "with instructions to enjoin the defendants perpetually from using the improved machinery with the bending lever for making hook and brad-headed spikes, patented to Henry Burden, the 2d of September, 1840, and assigned to the complainants, as set forth in the complainants' bill, and to enter a decree in favor of the complainants for the use and profits thereof, upon an account to be stated by a Master, under the direction of the said Circuit Court, &c." The mandate of the Supreme Court having been filed in this Court, the latter, on the 28th of June, 1853, entered a decree in conformity thereto, at the same time referring the case to Marcus T. Reynolds, Esq., as Master *pro hac vice*, to take and state the account. Mr. Reynolds having declined to serve as such Master, the Court, on the 20th of October, 1853, appointed Reuben H. Walworth, Esquire, in his stead. The latter, after some preliminary proceedings, commenced taking the proofs on the accounting, on the 5th of April, 1854. The hearing on this reference was continued till the 10th of June, 1864, when the evidence was closed. The Master subsequently served a copy of a draft report on the counsel for the respective parties, to which, on the 4th of March, 1866, the defendants filed thirty-three objections, and, on the 7th of the same month, the plaintiffs filed forty objec-

tions. The Master made his final report in May, 1866. To this report the plaintiffs filed forty exceptions to the main conclusions of the Master, and about fifteen hundred exceptions to the rulings of the Master made during the progress of the hearing before him. The defendants filed nineteen exceptions to the conclusions of the Master.

Elisha Foote, for the plaintiffs.

William A. Sackett, for the defendants.

SHIPMAN, J. This case was set down for hearing on the exceptions, before this Court, at Cooperstown, in October, 1867, when and where the counsel for the respective parties appeared, and, after consultation, concluded to submit the case on the pleadings and the evidence before the Master, together with briefs and arguments thereafter to be filed. These briefs and arguments have been filed, and the whole case is now before the Court, the record of the proceedings, including the arguments and the evidence taken by the Master, covering nearly seven thousand printed pages. In addition to this printed matter, there are large numbers of manuscript books and papers, many of which were referred to and consulted by the Master and the counsel during the progress of the hearing before him. No important portions of these, however, are now before this Court as evidence. Our attention has, therefore, been confined to the printed evidence submitted by the Master, and, after devoting several months exclusively to its examination, and to the various questions raised by the exceptions and the arguments thereon, we proceed to state the conclusions at which we have arrived. In doing this, we shall be as brief as possible, in view of the unexampled length to which the proceedings in the case have already been carried.

The first questions to be considered are those which relate to the rulings of the Master, on the hearing, on the admission or rejection of evidence, after objections of counsel. The plaintiffs have filed special exceptions to the Master's report, on account of these rulings, to the number of nearly fifteen

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hundred. These exceptions are objected to, by the defendants, as irregularly taken, for two reasons: first, that no exceptions were taken, before the Master, at the times the rulings were severally made; and, second, that these alleged errors of the Master were not embraced in the objections filed by the plaintiffs with the Master, to his draft report. In view of the condition of the Master's minutes, this phase of the case would not be free from embarrassment, even if the plaintiffs had conformed to the rules of practice, as to the time of taking their exceptions. Many of the rulings in question were not absolute, but evidence was often received, and the questions arising on the objections of counsel were reserved. What precise disposition was ultimately made of the particular questions reserved, does not always appear. It is not easy for the Court to deal with these, as it is almost or quite impossible to ascertain to what extent the evidence thus conditionally received was finally accepted or rejected by the Master.

But let us take the rulings of the Master that were formal and peremptory, overruling or sustaining objections to the admission of evidence at the time they were made. What are the rules of practice to be observed by the party who desires to revise such rulings? We think, that an exception should always be taken on the spot to each ruling of the Master which a party intends to contest. It need not then be drawn up in form, but it should be taken, by giving notice to the Master, and it is his duty to note the fact in his minutes. This is a familiar rule, constantly applied in other trials, and we see no reason why it should not be adhered to in hearings before Masters. However loose the practice may, in fact, be, the rule is well settled, especially in trials at law. In *Morris v. Buckley*, (8 Serg. & R., 211.) Tilghman, C. J., remarks: "Exceptions to evidence must be taken as soon as the Court has decided to admit or reject the evidence." The same point is decided in *Ligget v. The Bank of Pennsylvania*, (7 Serg. & R., 218,) where the same Judge explains the object and importance of the rule. In *Poole v. Fleeger*, (11

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Peters, 185, 211,) Mr. Justice Story remarks: "In the ordinary course of things, at the trial, if an objection is made, and overruled, as to the admission of evidence, and the party does not take any exception at the trial, he is understood to waive it. The exception need not, indeed, then be put in form, or written out at large and signed; but it is sufficient that it is taken, and the right reserved to put it in form within the time prescribed by the practice or rules of the Court." The reason of this rule is founded in the interest of justice, as its observance tends to narrow the limits of controversy; for, if the party in whose favor a ruling is made is notified that an exception is taken and the question is to be revised, he can waive the point and admit or withdraw the evidence, as the case may be, and thus avoid future controversy and delay over it. This is very often done, to the advantage of one or both of the parties. The same reasons exist for the observance of the rule in hearings before Masters, as in other trials.

It may be said, that this rule can have no application to the instances, on this hearing, where the Master admitted evidence objected to, and reserved the questions arising on the objections. As we have already intimated, it is not always easy to determine what precise disposition was made by the Master of many of these reserved questions. But, if he omitted to decide them, or ultimately decided them incorrectly, the first opportunity should have been taken to except to his omissions, or alleged errors, in this particular. This opportunity, if not presented before, occurred when the draft report was served and the parties filed their objections thereto. None of these errors are embraced in the objections then filed. Exceptions to these rulings appear, for the first time, among those presented to the Master's final report, although some of them were made years before either the draft report or the final report was drawn up. It would seem, from the authorities, that, if it is proper to except at all to the Master's final report, for rulings admitting or rejecting evidence, this can only be done where objections of the same kind have been made to the draft report. Lord Chief Baron Gilbert

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lays down the rule as follows: "The ancient rule was, that the party should never except, but where he has first objected to the draft of the report before the Master, and, where there was no objection brought in, it was allowed good cause to discharge the exception; and it were to be wished that this good rule was strictly followed, since, if the party had objected, he might have shown the Master his error, and the report would have been altered in that particular, and never have troubled the Court." This is substantially the rule of the English Court of Chancery, at the present time. (*Daniell's Chan. Practice*, 3d ed., vol. 2, p. 1304.) In *Story v. Livingston*, (13 *Peters*, 366,) Mr. Justice Wayne, speaking for the Court, says: "Strictly, in Chancery practice, though it is different in some of our States, no exceptions to a Master's report can be made, which were not taken before the Master; the object being to save time, and to give him an opportunity to correct his errors, or reconsider his opinion." We think, therefore, that, as to any questions arising upon objections made during the hearing, and reserved by the Master, they should have been embraced in the objections filed with him to his draft report; and, as to the rulings which were made final at the time the objections were taken, the exceptions should have been made and noted at once, as such rulings were made.

It is, indeed, somewhat doubtful, whether, strictly, any exceptions to the Master's rulings on the admission or rejection of evidence can be properly embraced in exceptions to the Master's final report. It is true that such a practice is recognized in *Daniell's Chancery Practice*, (vol. 2, p. 1323, 3d ed.,) but the author cites no authorities in support of it. On the contrary, in *Schwarz v. Sears*, (*Walker's Chancery Reports*, 19,) and in *Ward v. Jewett*, (*Id.*, 45,) it was expressly held, that an improper rejection of testimony is to be at once corrected by a motion to the Court for an order to compel the Master to receive the evidence, and not by exception to his report. See, also, the case of *Tyler v. Simmons*, (6 *Paige*, 127.) But it is unnecessary to pursue this branch of

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the inquiry. We are entirely satisfied that these exceptions in this case were taken too late. They were taken neither when the rulings were made, nor at the first opportunity thereafter.

However much looseness there may have been in practice, or however much we might be disposed to look with indulgence upon a departure from the rules in ordinary cases, we think it our duty to apply them strictly in the present case. Any other course would be attended with delay and embarrassment. It is true, that, so far as the evidence improperly admitted is concerned, we might strike it out, though this might leave the proofs in a confused and fragmentary state. But, where the evidence was improperly rejected, we are, in effect, asked to again refer this case to a Master for further proofs on many points involved in the controversy between these parties. We should not be justified in such a step unless the rules strictly required it. Neither of the parties could be benefitted by it. The enormous length and cost of this litigation have already rendered it barren of any substantial advantages to either party, in view of any possible result that might be reached, even at the end of another twenty years. Ten years, two months, and five days have already been consumed in taking the proofs on this reference, and nearly two years more in settling the report. From what we know of this controversy, after devoting months to a diligent and laborious examination of the evidence, we have no doubt that another reference would consume years. Such a result is almost certain, in view of the fact that the reference would have to be to a new Master, who would, in order to discharge his duty intelligently, have to examine the whole case, and, perhaps, make a new report. Such a course might be practicable were human longevity equal to what it was in the antediluvian ages. But, twenty years having been spent in this litigation, we think that the interests of all parties require that it should be brought to a close, if this can be done by a strict application of the rules of practice. This cannot be done, however, during the present generation, if the case is again to go to a Master. We, therefore, apply the rule strictly, and dismiss

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the fourteen hundred and seventy-two exceptions to the rulings of the Master in rejecting or receiving evidence, on the ground that they were not taken in time, and are irregularly before the Court.

As already stated, the object of this reference was to ascertain the amount of profits, if any, which the defendants made, by the use of the improvement secured to Burden by the patent of September 2d, 1840, and by him assigned to the plaintiffs. The article made, for which the defendants are liable to account, was the hook-headed spike, used largely in the construction and repair of railroads. The Master has found the period for which the defendants are liable to account to extend from October, 1845, to April, 1853, about seven years and a half. He found it necessary, or convenient, to divide this period covered by the infringement into separate business years, and give the results of the manufacture in each year. The first business year (during the last half of which the defendants are to account) ended April 4th, 1846; the second, April 3d, 1847; the third, April 1st, 1848; the fourth, March 31st, 1849; the fifth, March 30th, 1850; the sixth, May 3d, 1851; the seventh, May 1st, 1852; the eighth, April 2d, 1853.

The following table will show the number of pounds of hook-headed spikes manufactured by the defendants by the use of the infringing machine; the cost of manufacture; the nett proceeds of the sales; and the profit or loss, during each of the business years named, as found by the Master. We have simply numbered the years in their order, for brevity, and to avoid the unnecessary repetition of dates:

	No. of pounds.	Cost.	Nett proceeds of sales.	Profit.	Loss.
1st ($\frac{1}{2}$) year,	219,430 —	\$10,056.93 —	\$9,562.99 —	—	\$493.34
2d “	540,947 —	24,750.10 —	24,226.05 —	—	524.05
3d “	1,889,826 —	60,763.16 —	60,531.71 —	—	231.45
4th “	2,134,573 —	88,800.93 —	92,022.83 —	\$3,221.90 —	
5th “	1,811,030 —	74,391.87 —	72,963.26 —	—	1,428.61
6th “	4,167,373 —	158,917.46 —	151,267.89 —	—	7,649.57
7th “	4,422,426 —	158,940.81 —	149,939.06 —	—	9,001.75
8th “	4,131,766 —	151,521.53 —	133,906.22 —	—	17,615.31

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In addition to the above, the Master finds that 102,000 pounds were made, or rather sold, after the 2d of April, 1853, which, by stipulation, are to be estimated according to the scale of cost and sales of those made during the eighth business year. The nett result of the whole business, as found by the Master, may be stated, in round numbers, as follows: The defendants manufactured and sold, in violation of the complainants' patent, 19,000,000 of pounds of spikes, which brought them \$700,000. They made no profit, taking the whole time together. On the contrary, they sustained a loss of \$34,000. We give merely proximate sums, in round numbers. They made nothing, except in the fourth business year, when their profits were a little over \$3,000. During all the rest of the time, except the third business year, their losses steadily increased, reaching, in the last year, \$17,615.31. This is a singular and surprising result, especially in view of the admission by the defendants in their answer, and of several important facts that are apparent on the evidence.

(1.) The admission in the answer. The answer was sworn to March 1st, 1849, near the close of the fourth business year, by Mr. Winslow, who, as one of the parties in interest, and the active manager of this part of the business, was familiar with the whole subject of this controversy. This answer states, that the defendants admit that they "have, since the 15th of October, 1845, been engaged, and are still engaged, in manufacturing said brad or hook-headed spikes, whenever these defendants had or have a demand for the same, and that, in such manufacture, they have used, and still use, said improvement claimed by said complainants to be new and useful, and to be secured by the patent so as aforesaid granted to said Burden on the 2d day of September, 1840, and have thereby made large profits, but not to the amount of one hundred thousand dollars, as charged in said bill of complaint." This admission was deliberately made, after they had manufactured and sold over one hundred and eighty thousand dollars' worth of these spikes; and yet, according to the result arrived at by the Master, they had then made but little over two thousand

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dollars profit. It is difficult to reconcile this with the admission of the answer, that they had made large profits. It is said, in the report, that there is nothing in the answer to show what the defendants considered large profits. This may be true; but it is correct to assume that they used those terms in their ordinary sense, and, although they are not words that give exact information, they certainly cannot be deemed to have no meaning at all, or one the reverse of what is ordinarily understood by them. Considering the time over which the business had then extended, the skill and care devoted to it, and the capital employed, the amount of profit found by the Master to have accrued, at the time this answer was filed, was not only not large, but it was, on the other hand, extremely small—so small, that it hardly merited the term profit at all. It is difficult to resist the conclusion, in view of all the circumstances, that the defendants, at the time this answer was filed, looked upon this question of profit and loss in a different light from that in which it is presented in the report now before us.

(2.) The letters of the defendants, written to their customers, by the defendant Winslow, their business manager, touching the manufacture of these spikes, are significant evidence on this question of profit and loss. They are not the letters of an imperfectly informed clerk, or other subordinate, but of one of the partners, who shows throughout a perfect familiarity with the whole business. We give some extracts, which show their tenor. (Extracts are then given from nineteen letters, extending, in date, from September 27th, 1845, to July 19th, 1851, one being written in 1845, one in 1846, two in 1847, five in 1848, five in 1849, three in 1850, and two in 1851.) We have cited thus at length from these letters, because, as already intimated, we think they throw light upon the question of profit and loss now under consideration. They were written, in the ordinary course of business, by one of the defendants, who was thoroughly conversant with all the details of the business and the state of the market, both in respect to the raw material and the manufactured article.

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These letters cover nearly the whole period embraced in this accounting, and were written with a full knowledge of the results of the business from year to year, as the Master's report finds, "that accounts of the different departments of the defendants' manufacturing establishment or works, known as 'The Albany Iron Works,' have been closed or made up periodically, at the end of what are called business years." It is evident from these letters, that this business was conducted, from the very start, under the most favorable auspices, not as an untried experiment, but commencing after many years' experience, from which the means of making an accurate forecast must have been derived, and was carried on on a large scale, with the best machinery, and an abundance of the best material, with a conceded and growing reputation, with a large market, and wealthy corporations for customers, which the defendants were able to supply often at a day's notice, and with an increasing demand growing out of the widely acknowledged superiority of the article furnished, as compared with other kinds in the market. It is evident, too, from these letters, that, while the defendants furnished their customers with spikes manufactured from superior iron, they found their account in so doing, and charged the difference in the price between that supplied and poorer material; that they obtained a "living profit," at least, "a small profit," on the business, as they conducted it; that they found it for their interest, as well as the interest of their customers, to furnish the best article; and that, though they could have supplied one of poorer quality with "as much profit," yet it would have been at the expense of their acquired reputation, which they wisely chose not to forfeit. It is fairly inferable, also, from these letters, that they had no formidable, at least, no successful, rival in the business; for, these letters repeatedly assert, that the defendants manufactured the best article, that experience at once demonstrated that the best was the cheapest, and that all, or nearly all, their orders were for the best, those being the only ones their customers would buy or consent to use. It is true, indeed, that, in one letter, the de-

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fendants speak of being pressed by the rivalry of those who manufacture a cheaper and poorer article, yet, in the same letter, they assert emphatically, that they cannot use the best material in the manufacture of their spikes, unless consumers are willing to pay the difference between its cost and that of the poorer iron. Yet they continued the business, and used the best material, and were eager and successful in increasing the sale in the United States, down to the last. Throughout this correspondence, there is no hint by the defendants that they were losing money, or that they desired to abandon or curtail this branch of their business, or change its relative scale of prices, though, according to the report of the Master, the more they made and sold, even during the last three years, after the trade was thoroughly established, the heavier were their losses, until they rose, the last year, to over \$17,000, on a business of \$133,000.

(3.) These continued and increasing losses are not charged to any extraordinary embarrassment or unforeseen calamity. It is true that the spike-factory was burned during this period, but that was during the fifth business year, in which their entire loss, according to the Master, was only \$1,428.61. There was, indeed, a reduction in the prices at which the spikes were sold, after the second, and down to and including the seventh business year, but this reduction bears none of the marks of a struggle to win customers or force the market on particular occasions, but a regular lowering of rates, to make them correspond with the decline in the iron market, marked by intelligent calculation and forecast, free from the pressure of any necessity, so far as we can see, and undisturbed by any sudden irregularities, or great fluctuations in the prices or demands of the trade.

But the result arrived at by the Master we have stated, and the question of its correctness is raised before us by exceptions taken to his report by both parties. These exceptions, and the long and elaborate arguments thereon, refer to and open the immense mass of evidence from which the Master deduced his results. This evidence relates, of course, almost wholly, to the cost of manufacturing these spikes, including

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the cost of the raw material. The sum at which they were sold was easily ascertained, but, to fix the exact amount of expense which entered into the cost of their production, was, upon the plan on which this reference was conducted, (and, perhaps, would have been upon any plan that could have been adopted,) a work of immense labor and difficulty. We may say, indeed, that it was impossible to fix the exact amount of that expense, as many of the elements which entered into it had no existence in precise figures, and were incapable of being reduced to certain quantities. They were entangled with other and different branches of the defendants' large business, carried on in the same establishment, and their details were mingled with details relating to the cost of manufacture of a variety of other articles. It was, therefore, impossible to arrive at certainty, and a result was reached only through estimates, comparisons, and apportionment. These remarks apply more particularly to most of the various items of cost which entered into the manufacture other than the value of the iron, though they apply, in a measure, to that also. We have traced and examined the evidence in this case in detail, and now proceed to state our conclusions. We cannot add to our already prolonged labor by discussing at any great length these details which we have examined, and shall dwell only, and that briefly, on those parts of the case wherein we think the conclusions of the Master must be modified.

The largest item in the cost of manufacture is embraced in the value of the iron or spike-rods out of which the spikes were made. This item constituted over four-fifths of the whole expense, as will be seen from the following statement, derived from the results set forth by the Master:

In the first half year, ending April 4th, 1846, the defendants made or sold $109\frac{71}{100}$ tons of hook-headed spikes, which cost them, according to the report, \$10,056.93. The value of the iron is estimated at $\$75\frac{55}{100}$ per ton, being, in the aggregate, for the $109\frac{71}{100}$ tons, \$8,288.59.

In the business year ending April 3d, 1847, $270\frac{47}{100}$ tons,

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costing $\$24,750\frac{10}{100}$. The value of the iron is estimated at $\$75\frac{55}{100}$ per ton, amounting to $\$20,434$.

In the business year ending April 1st, 1848, $694\frac{21}{100}$ tons, costing $\$60,763\frac{16}{100}$. Value of iron, $\$72\frac{65}{100}$ per ton, amounting to $\$50,485\frac{20}{100}$.

In the business year ending March 31st, 1849, $1,067\frac{28}{100}$ tons, costing $\$88,800\frac{25}{100}$. Value of iron, $\$70\frac{08}{100}$, amounting to $\$74,794\frac{08}{100}$.

In the business year ending March 30th, 1850, $905\frac{51}{100}$ tons, costing $\$74,391\frac{87}{100}$. Value of iron, $\$67\frac{51}{100}$ per ton, amounting to $\$61,130\frac{28}{100}$.

In the business year ending May 3d, 1851, $2,083\frac{68}{100}$ tons, costing $\$158,917\frac{46}{100}$. Value of iron, $\$64\frac{36}{100}$ per ton, amounting to $\$134,106\frac{64}{100}$.

In the business year ending May 1st, 1852, $2,211\frac{21}{100}$ tons, costing $\$158,940\frac{81}{100}$. Value of iron, $\$60\frac{28}{100}$ per ton, amounting to $\$133,291\frac{17}{100}$.

In the business year ending April 2d, 1853, $2,056\frac{58}{100}$ tons, costing $\$151,521\frac{53}{100}$. Value of iron, $\$61\frac{88}{100}$ per ton, amounting to $\$127,261\frac{17}{100}$.

From this statement it will be seen that the value of the iron was the principal source of expense in the manufacture of the spikes. Fixing that value, therefore, was a very important consideration, and a variety of proof was gone into, to show at what prices it should enter into the expense account of the defendants. The propriety of this will at once appear, when we consider that this value was to be settled on $9,399\frac{35}{100}$ tons, besides the 51 tons sold after the 2d of April, 1853, and which was to be fixed by stipulation. A comparatively small variation in the price of this large amount of raw material would produce a decided effect on the general result, as shown in the balance-sheet. All, or nearly all, of the important evidence before us on this point, comes from the defendants' witnesses. In the early stages of the reference, the plaintiffs offered considerable evidence, which they claimed was pertinent to the question, which was received under objections reserved by the Master, but subsequently the Master rejected

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it, on the ground that it related to a different kind and quality of iron from that which the defendants actually used. That evidence is, therefore, not before us for consideration. The defendants did not buy this iron in the form of spike-rods, but manufactured the rods themselves, at the same place where they made the spikes. No purchase price could, therefore, be proved as the measure of their value. Resort was consequently had to the sales by others of like rods, and of other forms of iron of similar quality in New York, Pennsylvania, Massachusetts, and Connecticut, and to such sales of like iron as the defendants made at their works. Upon this evidence, which we will refer to at some length hereafter, the Master made an estimate of the average market value of such iron as the defendants used at their works, during each of the years for which they are to account. On this point the report says: "I have, therefore, from the evidence in this case, made an estimate of the market values in each business year, of a ton of such spike-rods as the defendants did use in manufacturing their hook-headed spikes, except that the defendants' rods were not all cropped. And the schedule, I, hereto annexed, and forming a part of this, my report, contains what I conclude to have been the actual market values, per gross ton, of 2,240 pounds, of such spike-rods, after making a very liberal deduction from the values testified to by the witnesses, on account of the fag-ends which were on a part of the hook-headed spike-rods used by the defendants. In the same schedule, I, I have computed the amounts of those estimated average market values, in each business year, per ton of 2,000 pounds. Those estimated values, I conclude, are not more than the real market values, at the Albany Iron Works, of the spike-rods used there, per ton of 2,000 pounds of rods, in manufacturing hook-headed spikes, made with the use of the bending lever, in the same business years respectively. But, inasmuch as the plaintiffs' counsel claimed and insisted that a deduction ought to be made from the value, at the Albany Iron Works, of the spike-rods made there by the proprietors themselves, and not purchased by them, to cover the risk and

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expenses of marketing such rods if they had been sold by the defendants, I have, for greater caution, concluded to make a deduction of five *per cent.* from these values, per ton of 2,000 pounds, which diminished values are also computed and entered in said schedule, I." The report also finds, that, "to make a ton of 2,000 pounds of hook-headed spikes, of the sizes, on an average, which were made, would require about 2,150 pounds of such spike-rods as were used for that purpose, in the several business years, at the Albany Iron Works, and that, in making a ton of 2,000 pounds of such spikes, the scrap would be about 130 pounds, and the wastage, in addition to the scrap, about 20 pounds."

The Master finds the values of the iron used to make a ton of hook-headed spikes, of 2,000 pounds, during the respective years embraced in the accounting, as follows :

1st ($\frac{1}{2}$) year,	\$75.55	5th	year,	\$67.51
2d	"	6th	"	64.36
3d	"	7th	"	60.28
4th	"	8th	"	61.88

The values were arrived at by estimating, from the evidence, the value of the iron, in gross tons of 2,240 pounds; then finding the value in nett tons of 2,000 pounds; from the last deducting five *per cent.*; then finding the value of 2,150 pounds, thus reduced; and from that, deducting the value of 130 pounds of scrap. The wastage, 20 pounds, of course, disappears. For example, the first (half) year, the iron is estimated :

Per gross ton, at	\$85.00
Per nett ton, at	75.89
After deducting 5 <i>per cent.</i>	72.10
2,150 pounds of rods, at \$72.10 per 2,000 pounds	77.50
Deduct for 130 pounds of scrap, at $1\frac{1}{2}$ cent per pound	1.95
	<hr/>
	\$75.55

For the remaining years, the calculations were made in the same way, and the iron, per gross ton, was estimated as follows :

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2d year,	\$85.00	6th year,	\$72.50
3d "	82.00	7th "	69.00
4th "	79.00	8th "	70.00
5th "	76.00		

We now proceed to examine the evidence upon which the estimated values of iron per gross ton were founded, confining ourselves to that offered by the defendants. The witnesses were manufacturers of iron, and were called to prove the prices at which they sold iron of a similar quality to that which the defendants put into the spikes in question. We will give the prices at which they sold from year to year, with the estimated prices allowed by the report to the defendants for the spike-rods of the latter, arranging the prices of each witness and the prices allowed by the Master in parallel columns. These prices refer to gross tons of 2,240 pounds.

Philip Ripley was a manufacturer of iron at Windsor Locks, Connecticut, and made iron of a similar quality to that used by the defendants. He sold, during the period of this accounting, less than 500 nett tons, and his sales are given in parcels, about 200 in number. Whether this is the precise number of lots into which his sales were divided does not certainly appear, but, from his testimony, we infer that the quantities given were taken from his books, and were copies of the entries made from time to time. The quantities vary from a few hundred to several thousand pounds each, and were sold to various customers. There was a variety of sizes, some ten or a dozen, of various shapes, square, round, flat, &c. Some of it was in the form of spike-rods, and some in other shapes. There is a very considerable variation in prices, even in sales apparently made at about the same time. He gave his prices as follows :

			Allowed by Master.
1st ($\frac{1}{2}$) year,	\$90	to \$100	\$85
2d "	80	to 100	85
3d "	77 $\frac{1}{2}$	to 90	82
4th "	75	to 80	79
5th "	75	to 80	76

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6th	year,	\$65	to	\$70	\$72½
7th	"	65	to	70	69
8th	"	no sales given,			70

Philip D. Borden was a large manufacturer of iron at Fall River, Massachusetts. He does not, like Ripley, give the details of his sales. The iron was sold at Fall River, Providence, Boston, and New York, as well as to customers through correspondence. This witness does not give the prices for the precise years into which the time is divided by the Master, but gives it according to the calendar years. He also gives average, instead of exact prices. His estimates appear to be confined to round and square rods of various sizes, ranging from $\frac{3}{8}$ to $\frac{1}{2}$ in diameter. In what quantities they were sold does not appear. His average prices are as follows :

Allowed by Master.

From Oct. 1st, 1845, to Jan. 1st, 1846,	\$90	\$85
From Jan. 1st, 1846, to Jan. 1st, 1847,	85	85
From Jan. 1st, 1847, to Jan. 1st, 1848,	85	82
From Jan. 1st, 1848, to Jan. 1st, 1849,	80	79
From Jan. 1st, 1849, to Jan. 1st, 1850,	80	76
From Jan. 1st, 1850, to July 1st, 1850,	75	72½
From July 1st, 1850, to Jan. 1st, 1851,	70	72½
From Jan. 1st, 1851, to Jan. 1st, 1852,	70	69
From Jan. 1st, 1852, to Jan. 1st, 1853,	65	70

Of course, if the Master had adjusted his division of time exactly as the witness did, he might have made some slight variations in his yearly price, though the general result would have been substantially the same.

Isaac Bortelot was an iron manufacturer in Reading, Pennsylvania. He appears to have sold his iron generally to the trade. In what quantities he sold at a single time, or to a single customer, does not appear. This firm manufactured from 1,500 to 2,000 tons annually, but this included the heavier kinds, which were made from pig iron puddled. The lighter kinds, such as spike-rods, were, as a general thing, made from wrought iron scraps, like the defendants'. The proportion of iron made from the puddled pig, and that from wrought iron

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scraps, does not appear. The prices given by this witness are estimates of about what the average would be, made "in his head," after looking at his books, and are as follows:

		Allowed by Master.
1st ($\frac{1}{2}$) year,	\$85	\$85
2d "	82 $\frac{1}{2}$	85
3d "	80	82
4th "	75	79
5th "	75	76
6th "	72 $\frac{1}{2}$	72 $\frac{1}{2}$
7th "	70	69
8th "	82 $\frac{1}{2}$	70

Abram B. Kingsland, an iron manufacturer at Keeseville, New York, made and sold to the trade and customers generally, and manufactured nails. He gives the prices of round and square rods made of materials like the defendants', for a portion of the years in question, as follows:

		Allowed by Master.
1st year,		
2d "		
3d ($\frac{1}{2}$) year,	\$90	\$82
4th "	85	79
5th "	85	76
6th "	82	72 $\frac{1}{2}$
7th "	80	69
8th "	80	70

It should be remarked that this witness gives "about" the average prices.

John Mitchell, an iron master at Norwich, Connecticut. He made iron of the same quality as the defendants', and sold to the trade and customers generally, and gives about the average prices as follows:

		Allowed by Master.
1st ($\frac{1}{2}$) year,	\$85	\$85
2d "	85	85
3d "	85	82
4th "	82 $\frac{1}{2}$	79
5th "	72 $\frac{1}{2}$	76

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6th	year,	\$70	\$72½
7th	"	68½	69
8th	"	73	70

Nathan Rowland, an iron manufacturer in Philadelphia, made from 500 to 600 tons *per annum*, of the same quality as the defendants', of which 300 to 400 tons were made into round and square rods, of not more than ¼ths of an inch in diameter. He sold generally in the market, and to ordinary customers, at the following prices :

1st	year,		Allowed by Master.
2d	"		
3d	"	\$75	\$82
4th	"	75	79
5th	"	70	76
6th	"	70	72½
7th	"	75	69
8th	"	70	70

The witness gives about the average prices, and not the details of his sales.

There is some other evidence of the same general character, but we have given the most important, and that which shows the state of the general market in various places, as evinced by the sales of iron manufacturers under the ordinary circumstances which characterized the trade. In addition to this, it should be stated, that the defendants proved their sales of iron of a similar quality to that which they put into these spikes. These sales cover the period of accounting. They represent the sales in spike-rods, horse-shoe iron, hame iron, hoop iron, hoops, and beer hoops, and include, in round numbers, about 1,000 nett tons, about 200 of which were spike-rods. The figures apparently represent a variety of separate sales, amounting to several hundred in number. The prices range higher than the average of sales by other manufacturers. The quantities varied from 50 pounds to 6,000 pounds. During the first half business year, the prices ranged from \$89.60 to \$112, per gross ton of 2,240 pounds ; the second, the price was \$89.60 ; the third, from \$89.60 to \$134.40 ; the fourth,

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\$89.60; the fifth, from \$75 to \$90; the sixth, from \$89 to \$89.60; the seventh, from \$80 to \$85; and the eighth, from \$80 to \$84. The evidence of Artemas Hammond, the spike-maker and the purchaser of spike-rods, we will refer to hereafter.

It is evident, from an inspection of the report in the light of this evidence, that the Master struck a fair average of the prices of the sales of the manufacturers of iron of the same quality as that used by the defendants; and, after making an allowance for the fag-ends which were on a portion of the defendants' rods, in excess of those found on the rods of others, made this average the price at which the defendants' rods are charged in their expense account, in the first instance. This estimated price per gross ton of 2,240 pounds, forms the basis of the iron account, modified only by reducing the amount to nett tons, deducting from these five *per cent.*, then taking 2,150 pounds to make 2,000 pounds of spikes, and allowing, of that, 130 pounds for scrap, and 20 pounds for wastage. The prices of the rods, per gross tons, and per nett tons, of spikes, will appear as follows:

	Per gross ton.	Per ton of spikes.
1st ($\frac{1}{2}$) year,	\$85	\$75.55
2d "	85	75.55
3d "	82	72.65
4th "	79	70.08
5th "	76	67.51
6th "	72 $\frac{1}{2}$	64.36
7th "	69	60.28
8th "	70	61.88

These were assumed as the market prices during the respective years, at the defendants' works, and they represent a pretty fair average of the prices in other places, as shown by the sales proved by the different manufacturers who testified on the reference. No reduction was made on the nine thousand four hundred tons of raw material manufactured by the defendants, and by them turned into hook-headed spikes, by

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the use of the plaintiffs' patented machine, except the item for fag-ends, and the item of five *per cent.* The propriety of allowing for the fag-ends which were on the defendants' rods, and not on those proved to have been sold by others, is obvious. How much was allowed does not appear, but the Master states that it was liberal. The five *per cent.* allowed was "to cover the risk and expenses of marketing such rods, if they had been sold by the defendants." The propriety of this allowance is equally obvious, in view of the fact that the defendants are allowed, in their expense account, for the risk and expense of marketing the spikes. Thus, it will be seen that, under this theory, the defendants, as iron manufacturers, sell 9,400 tons of spike-rods, to themselves as spike-makers, under what is equivalent to a single contract, with a regular and continuous delivery, at the same prices at which the same article was sold to different purchasers, in different localities, in quantities varying from a few hundred pounds to thirty tons. This is said to be equitable, on the ground that they ought to be allowed the market prices for their rods, and that such prices, therefore, form proper charges in their expense account. Moreover, the defendants allege, that the prices from which the Master has struck his averages, were the wholesale, and not the retail, prices, and therefore furnish the only true guide on this subject. These, and other considerations, have been urged by the defendants' counsel, in an elaborate and exhaustive argument, to which we have not been inattentive.

After a careful consideration of this question of the prices at which the rods should enter into the expense account of the defendants, we are satisfied, in view of the whole evidence bearing upon it, that the conclusions of the Master thereon should be modified. As has been stated, the rods were made by the defendants, and by them wrought into spikes by the use of the plaintiffs' patented machine. A large and ready market was thus furnished to the defendants for their iron, within the very precincts of their rolling-mills, under circumstances which, as we have said, were equivalent

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to a single and continuous contract for 9,400 tons of spike-rods. These rods were manufactured under the most favorable auspices, were of very few sizes, of one shape, and dropped from the rolls into this ready market, and were at once absorbed by a single customer. For the purposes of this case, we may properly consider the defendants, in this position, as iron manufacturers, selling their rods to themselves as spike-makers, and inquire what would have been the price at which they would readily have sold these rods, in such quantity, to any other spike-maker, supposing that the defendants had not been in the latter business. Now, no such sale has been proved in the general market. None probably could have been proved, which would have embraced any thing like the same quantity, to a single purchaser. The sales that have been proved were in comparatively small quantities, to single purchasers, and, though stated to be at wholesale prices, yet, in view of the comparative smallness of the individual sales, and the number of customers, these transactions, as contrasted with the immense quantity of one kind of iron which the defendants transferred from one department of their business to another, were more of the character of a retail, than a wholesale business. The quantity of merchandise of a single size, form, and quality, to be delivered under a single contract, all other things being equal, inevitably affects the price, up to a certain point. No law of trade is more regular in its operation than this. The reasons upon which it is founded are obvious. The manufacturer who thus deals, on a large scale, with a single transaction and a single customer, can and does produce and sell cheaper than when his business is split up into a multitude of smaller transactions. He forecasts the future, and buys his raw material, and works it up under circumstances which he can control, and proceeds with greater certainty, uniformity, and economy.

We, therefore, think, that the circumstances under which the defendants transferred this large quantity of rods from their rolling-mills to these spike-machines, should be con-

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sidered, in arriving at the prices at which they should be charged in the expense account. If it is still insisted that these circumstances cannot be properly allowed to influence our decision, and that the "market price" at the defendants' works is, after all, the only true guide, it may be replied, that the evidence does not justify us in assuming that there was a market price there, or any where else, for any such quantity of rods as the defendants consumed. There was no other *such* market as these spike-machines furnished to the defendants' rolling-mills. We are, therefore, satisfied, that we ought not to ignore the condition of things under which the defendants, as iron-makers, furnished themselves, as spike-makers, with these rods. On the contrary, we are constrained to think that it is a proper subject for our consideration, and that its natural and legitimate effect should be allowed to operate in the reduction of the prices at which these rods are charged by the Master in the defendants' expense account. We have carefully considered the extent of that reduction, and, after weighing the whole matter, are satisfied that it should be at the rate of four dollars and a half per ton of rods used to make a ton of spikes of 2,000 pounds weight. This we regard, in view of the whole evidence germane to the point, as allowing a fair price for the rods. In coming to this result, we have not overlooked the testimony of the defendants' witness, Hammond, so earnestly pressed upon our attention by the plaintiffs' counsel, but we have not attached any very great importance to it. It is true that he states that, for three of the years covered by the periods of accounting, the firm of Adams & Hammond, of which he was a member, made about 200 tons of spikes per annum. They received all their rods from the Plymouth Iron Company, and they were of the same quality of wrought iron scrap rods as those used by the defendants. They were received under a single contract, and at a price \$5.60 per ton less, on the average, than the Master has allowed the defendants for their rods during the same years. Still, this was comparatively a limited transaction, the whole circumstances connected with which may

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not be before us, and the witness who testified to it did not seem to have a very clear idea of the iron market at the time to which his testimony referred. He thought that the market price of iron advanced some in the latter part of 1845, and continued to advance for two or three years afterward; but in this he was mistaken. As the whole evidence shows, iron did not rise, but continued steadily to decline, during nearly the entire period covered by the accounting, and down to the last year, when there appears to have been a slight reaction. Still, as we have already remarked, we do not attach any very great importance to the facts testified to by this witness, though, as far as they go, they tend to show that the prices allowed by the Master for the defendants' rods for the first three years is too high, and that our reduction is none too much.

This question, touching the value or price at which the spike-rods are allowed by the Master, and included in the expense account of the defendants, was raised and presented by the plaintiffs' sixth exception to the report of the Master. This exception is, therefore, sustained to the extent and upon the principles we have set forth. All the other points raised by this exception are overruled.

The plaintiffs' twenty-third exception raises several questions, touching the allowance, made by the Master, for the "use of water-power, buildings, lands, machinery, and tools, for spike-factory purposes." The only remarks we have to make upon this exception, which includes a variety of objections, stated in detail, will relate, first, to the principle of allowing any thing at all for the use of the property; and, second, to the amount actually allowed by the Master. This property we may call, for convenience, the fixed capital used by the defendants in the business of manufacturing these spikes. We use this term, to distinguish it from what is called, in another part of the case, the floating capital. The material points involved in this aspect of the case, will appear more clearly, by citing the language of the report. The Master says: "A part of the expenses of manufacturing the

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hook-headed spikes, made with the use of the bending lever, by the proprietors of the Albany Iron Works, was the value of the occupation and use of the real estate, buildings, water-power, dams, bulk-heads, water-wheels, and other fixtures and machinery, machines, and tools, exclusively employed by the spike-factory department, in the manufacture and storage of its productions, etc., and of the materials used by its mason, carpenter, blacksmith, etc., from time to time. Schedule O, hereto annexed, and forming a part of this, my report, contains an estimate, which I have made, from the testimony, of the average values, in the last half of the business year ending the 4th of April, 1846, and in each of the seven succeeding business years, of the water-power, the spike-factory building, the spike-factory store house, and of the dam, bulk-head, water-wheel, and propelling machinery, and of the machinery and tools in the spike-factory. From these estimated values, which I believe to have been about the true values of this part of the spike-factory property, from time to time, according to the weight of the testimony, I have, for greater caution, and because I believed it would not alter the result of this reference, deducted ten *per cent.*" The report then proceeds to allow eight *per cent. per annum* on the estimated value of this part of the spike-factory property, and to allow such a proportion of the amount as was properly chargeable to the hook-headed spikes, leaving the balance out, as belonging to the other articles manufactured in the spike-factory. He allows for the

1st ($\frac{1}{2}$) year,	\$171.14
2d "	432.75
3d "	672.67
4th "	947.74
5th "	1,116.04
6th "	1,994.08
7th "	2,074.11
8th "	1,597.96
The total amount of these items is	- - \$9,006.49.

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The plaintiffs contend, that this is in the nature of rent, for the use of premises which the defendants had already erected for their other business, and, that, therefore, it should not be allowed as an item in their expense account. But we do not see how the true amount of profit derived from the use of the machines is to be determined, without deducting, from the value of the articles made, all the elements of cost in their production. The use of shop room and tools is a necessary ingredient in the expense of manufacturing most articles, and we see no reason why it must not be estimated and allowed as part of the expense account. The case of *Goodyear v. The Providence Rubber Co.*, is cited by the plaintiffs, in support of their objection to this allowance. But, as that case is not reported, and the decision was oral, we are not in possession of the reasons by which it was supported. On the whole, we think, the allowance of the items embraced in this exception was correct, on principle. We have examined the evidence upon which the amount allowed by the Master rests, and, although the final results at which he arrived were reached by estimates and apportionments, we cannot say that he has erred in these, or that the evidence fails to support them. As we have already stated, in another part of this opinion, certainty, in fixing many of the items of the defendants' expense account, was impossible; but we think the amount allowed by the Master, under this head, was no more than reasonable. This exception is, therefore, overruled.

The plaintiffs, by their twenty-fourth exception, object to the allowance made by the Master for the use of what is called floating capital. The total amount allowed by the Master, under this head, was \$7,692.94. We regard the principle upon which this allowance was made as correct, and, after examining the evidence, we approve of the amount allowed.

There are over fifty remaining exceptions to the conclusions of the Master, on the one side and on the other, which have been discussed at great length by counsel. Of these

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exceptions, the evidence bearing on them, and the arguments presented, we have made a prolonged and laborious examination. We have endeavored to sift, analyze, and classify the evidence bearing upon each point raised, and, on the whole, have concluded to overrule them all. But we cannot undertake to go into the reasons that have led us to this result, as we could not do so without extending this opinion over hundreds of pages. This evidence relates to innumerable details, the discussion of which could not be compressed into the compass of an ordinary volume. We, therefore, content ourselves by stating the result at which we have arrived, touching these remaining exceptions.

Reducing the price of the spike-rods, as we have already indicated, and leaving the rest of the report to stand, we find that the amount of profits made by the defendants, in the use of the plaintiffs' patent described in the bill, between the 15th of October, 1845, and the 31st of March, 1849, after deducting the losses that subsequently accrued, is \$8,475.09. The plaintiffs are, therefore, entitled to recover this sum, with interest at the rate of seven *per cent. per annum*, from the last-named date to the entry of the final decree in this cause.

As, upon the facts reported by the Master, and not excepted to by either party, Mr. Horner is to be deemed a member of the firm, and, therefore, a codefendant, down to March 31st, 1849, after which no profits were made, his withdrawal from the firm does not require to be noticed in the decree.

The rule touching the time from which interest is to be computed, which we have adopted, is liberal toward the defendants, and we have, therefore, taken no account of the trifling loss on the fifty-one tons of spikes made by the defendants, the adjustment of which was provided for by stipulation. Subject to the modification in the price of the rods, which we have indicated, let the report of the Master, in this case, be confirmed, and a decree be entered for the plaintiffs, for the sum of \$8,475.09, with interest from March 31st, 1849,

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to the date of the decree, together with costs to be taxed. The clerk of this Court is directed to compute the interest, and include the same, on the entry of the decree.

CORNELIUS M. MERSEROLE AND JAMES L. LIBBY

v8.

THE UNION PAPER COLLAR COMPANY. IN EQUITY.

In order to give to this Court jurisdiction of an original suit on the ground of parties, it must be a suit between a citizen of the State of New York and a citizen of another State; and the necessary averments of citizenship, to confer jurisdiction, must appear on the face of the bill.

This Court has no authority to entertain a suit to declare a patent void, except in the cases provided for by the 16th section of the Act of July 4th, 1836, (5 *U. S. Stat. at Large*, 123,) and the 10th section of the Act of March 3d, 1839, (*Id.*, 354.)

Where a bill in equity was filed in this Court to restrain the defendant from suing the plaintiff on a license under a patent, to recover tariffs thereunder, and to have it decreed that the consideration for the license had failed, because the patent was void for want of novelty, and to have the license canceled: *Held*, That the rights of the defendant, by virtue of the license, arose out of the license, and not out of or under the patent, or the law under which it was granted, so as to give to this Court jurisdiction of such bill, under the 17th section of the Act of July 4th, 1836.

A State Court has jurisdiction to decree a license under a patent to be void, and the fact that, in the investigation, that Court will be obliged to inquire collaterally, into the novelty and validity of the patent as a consideration for the license, cannot deprive the State Court of jurisdiction, or confer it on this Court.

A direct suit to repeal a patent cannot be brought in a State Court.

(Before BLATCHFORD, J., Southern District of New York, March 27th, 1869.)

THIS was a bill in equity, to which a demurrer was interposed by the defendants. The plaintiffs were described, in the bill, as "citizens of the United States," but they were not averred to be citizens of any State of the United States. The defendants were described as "The Union Paper Collar Company, claiming to be a corporation created under the laws

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of the State of New York, and having its office and principal place of business in the Southern District of New York." The plaintiffs were manufacturers of paper collars. On the 9th of January, 1868, they became the assignees, by an assignment in writing, of a license in writing, granted by the defendants, on the 11th of May, 1866, to the Norwich Paper Collar Company, to make and sell collars, cuffs, and bosoms of paper, or of cloth and paper, according to any or all of nine several letters patent, granted by the United States, and set forth in the license, on the payment to the licensors of certain specified current tariffs. The assignment of the license to the plaintiffs was made with the consent of the defendants, and on the assumption, by the plaintiffs, of the covenants of the license as to the payment of tariffs, and otherwise. The bill averred, that the plaintiffs purchased the license on the strength of representations, previously made to them by the defendants, that the patents were valid, and that the plaintiffs, if they purchased the license, would be allowed to make and sell four millions of paper collars, without paying therefor. It also averred, that the patents were, all of them, invalid, for want of novelty; that the consideration for the purchase of the license by the plaintiffs was void; that the plaintiffs had paid some tariffs under the license; and that the defendants were now claiming tariffs, under the license, from the plaintiffs, on such four millions of collars. The prayer of the bill was, (1.) That, during the pendency of the suit, the defendants might be enjoined from commencing any suit at law upon the license, to recover from the plaintiffs the tariffs reserved therein upon the collars manufactured by the plaintiffs, and from alienating the license; (2.) That this Court would decree all of the patents void for want of novelty, and that thereby the consideration for the license had entirely failed; (3.) That the defendants might be decreed to cancel the license, and the agreement made by the plaintiffs in the assignment of it to them, and to return the amount of tariffs paid by the plaintiffs.

The demurrer was interposed on the ground that it did

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not appear, from the bill, that this Court had jurisdiction of the subject-matter of the suit, or of the parties thereto, or to grant the relief therein prayed for.

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Clarence A. Seward, for the plaintiffs.

George Gifford, for the defendants.

BLATCHFORD, J. In order to give to this Court jurisdiction of this suit on the ground of parties, it must be a suit between a citizen of the State of New York and a citizen of another State. (*Act of September 24th, 1789, § 11, 1 U. S. Stat. at Large, 78.*) The necessary averments of citizenship, to confer jurisdiction, must appear on the face of the bill. This bill is defective in that respect. The plaintiffs are not averred to be citizens of any State, but only citizens of the United States. It should appear, affirmatively, that they are not citizens of the same State with the defendants.

The other ground of jurisdiction invoked is, that of the subject-matter of the suit. In that respect, the bill is founded wholly on the alleged invalidity of the patents; for, if this Court has not jurisdiction, growing out of the subject-matter, to decree the patents to be void, it has none to enjoin the defendants from suing on the license under the patents, or to decree that the consideration for the license has failed, or to decree the canceling of the license or the agreement, or to decree a return of paid tariffs.

The only authority conferred on this Court, by any statute of the United States, to adjudge any letters patent to be void, is that given by the 16th section of the Act of July 4th, 1836, (5 *U. S. Stat. at Large, 123,*) as extended by the 10th section of the Act of March 3d, 1839, (*Id.*, 354.) Such authority extends, by those provisions, no further than to a case of two interfering patents, and to a case where the granting of a patent is refused by the Commissioner of Patents, or by the Chief Justice of the District of Columbia, on appeal. The jurisdiction of this Court fails, therefore, in this case, as respects the subject-matter, so far as regards the conferring

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on it of any special authority to declare the patents in question void.

It is urged, however, on the part of the plaintiffs, that the 17th section of the Act of July 4th, 1836, confers upon this Court jurisdiction to declare these patents void. That section provides, that "all actions, suits, controversies, and cases arising under any law of the United States, granting or confirming to inventors the exclusive right to their inventions or discoveries, shall be originally cognizable, as well in equity as at law, by the Circuit Courts of the United States." It is claimed that this suit is one arising under the laws of the United States which grant to the patentees named in the patents in question the exclusive right to the inventions covered thereby.

So far as regards the right of the defendants to sue the plaintiffs upon the license, to recover from the plaintiffs the tariffs reserved therein, and the right of the defendants to alienate their interest under the license, and their right to hold in force, as against the plaintiffs, the license and the agreement made by the plaintiffs in the assignment of the license to them, and the right of the defendants to retain the amount of tariffs paid by the plaintiffs, it needs no argument to show that those rights arise, all of them, out of and under the license and the agreement and the transactions thereunder, and not, in any proper or legal sense, out of or under the patents or the law under which they were granted; and that this suit, so far as it seeks to impair or destroy those rights, has the same origin and basis. It is well settled that such a subject matter does not confer on this Court jurisdiction of a suit. (*Wilson v. Sandford*, 10 *Howard*, 99; *Goodyear v. The Union India Rubber Company*, 4 *Blatchf. C. C. R.*, 63.) Whether the suit be one by a licensor, to enforce the covenants contained in a license granted under a patent, as in the cases just cited, or be, like the present suit, one by a licensee, to destroy and annul a license and its covenants, it is equally impossible to find, in the subject-matter, any basis for the jurisdiction of this Court. So far as the suit is based on any alleged false representations made by the defendants, it

arises out of a fraud committed by the defendants, and not under any Act of Congress.

If the license and the agreement of the plaintiffs are void because the patents are void, the fact that the plaintiffs must show that the patents are void, in order to get rid of the license and the agreement, does not make the case one arising under the Patent Act, so as to give to this Court jurisdiction of it. A State Court has jurisdiction to decree the license and agreement to be void and inoperative for fraud, or any other adequate reason; and the fact that, in the investigation, the State Court will be obliged to inquire whether there was any thing new in the patents which could operate as a consideration for the license and the agreement, cannot deprive the State Court of jurisdiction or confer it on this Court. It is true, that a State Court cannot take cognizance of a suit brought for the infringement of a patent, nor of a direct suit brought to decree a patent to be void. But, as is well said by Chief Justice Williams, in *Rich v. Atwater*, (16 Conn., 409, 414:) "That the validity of patent rights is a subject peculiarly within the jurisdiction of the Courts of the United States, is true. But, it is equally true, that, when they come in question collaterally, their validity must become a subject of inquiry in the State Courts. Thus, in a suit upon a note, if it is claimed that the note was given for a patent right, and the patent is invalid, and so there was no consideration for the note, the State Courts constantly exercise jurisdiction." In *Rich v. Atwater*, the plaintiff owned a patent for a machine, which the defendant was infringing. The defendant, by a covenant, agreed not to use the infringing machine any longer, but, nevertheless, went on using it, and the plaintiff brought a suit founded on the agreement, for an account and an injunction. The defendant offered to prove that the patent was invalid for want of novelty. The plaintiff objected to the evidence, and took the point before the full Court, which held that the evidence was admissible. In *Cross v. Huntly*, (13 Wendell, 385,) the suit was brought on a note given on the sale of a patent for a machine. In defence, it

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was proved that the machine was not new, and that the specification of the patent was so defective as to avoid the patent. Mr. Justice Nelson, in delivering the opinion of the Court, says: "It is insisted by the defendant below, that the patent is void, on the grounds, (1.) That the machine, for the making and vending of which the patent was granted, is not a new invention; and (2.) If new in part, the patent is void, inasmuch as it is for the whole machine, and not for the improvement. If either of these positions were sustained by the proof, the defendant was entitled to judgment in the Court below, as, in such case, a failure of the consideration of the note was shown. From the evidence, there cannot be a doubt but that the patent, in both respects, is defective and void.

* * * The patent being void, nothing passed to the plaintiff in error, and the note was given without consideration."

The case of *Head v. Stevens*, (19 *Wendell*, 411,) was one of the same character. It can make no difference whether the payee of the note, or the licensor in the license, brings the suit, to enforce the note or the license, or whether the suit is brought by the maker of the note, or the licensee in the license, to cancel the instrument. The State Court has jurisdiction, in either case, to inquire collaterally into the validity of a patent.

It is true, that a State Court cannot entertain jurisdiction of a direct suit to repeal a patent. Every citizen has, abstractly, the same interest with every other citizen, that a void patent shall not be in existence. Yet such interest is not sufficient to warrant the maintenance of a suit to repeal a patent. Such a suit cannot be brought in a State Court. If not embraced within the 16th section of the Act of 1836, and the 10th section of the Act of 1839, it is not within the jurisdiction of this Court. For, it cannot be contended that every citizen has a right to bring a suit in the Circuit Court of the District where the proper defendant may be found, to repeal a patent, for the reason that such suit is a suit arising under a law of the United States. If such right existed under the 17th section of the Act of 1836, the provisions of the 16th

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section would be useless. The two sections must be construed together, and the conferring of authority, by the 16th section, to declare a patent void in certain specified cases, must be regarded as intended not to confer such authority in any other cases.

The bill must be dismissed, with costs.

JAMES FISK, JR.

v8.

THE UNION PACIFIC RAILROAD COMPANY AND OTHERS.
IN EQUITY.

Where a Court of the United States has no jurisdiction of a case, it has no power to make any order in it except to dismiss it for want of jurisdiction.

The 12th section of the Judiciary Act of September 24th, 1789, (1 *U. S. Stat. at Large*, 79,) and the Act of July 27th, 1866, (14 *Id.*, 306,) and the Act of March 2d, 1867, (*Id.*, 558,) are statutes where the right to remove a case from a State Court into a Court of the United States is made to depend upon citizenship or alienage.

The Act of March 2d, 1833, (4 *U. S. Stat. at Large*, 632, 633,) and the Act of March 3d, 1863, (12 *Id.*, 755, 756,) and the Act of July 27th, 1868, (15 *Id.*, 226, 227,) are statutes where the right so to remove a case is made to depend upon subject-matter.

The Act of July 27th, 1868, is constitutional.

Under the Act of March 2d, 1833, and the Act of March 3d, 1863, and the Act of July 27th, 1868, the entire suit is removed if any part of it is removed.

The 2d section of the Act of July 27th, 1868, construed, as to what suits are removable under it, and at whose instance, and what is the mode of removal.

The right to remove a cause, under all the Acts of Congress providing for removals, is a right conferred directly by the Act of Congress, and is not dependent upon the volition, or action, or non-action, of a State Court.

No *mandamus* from a Court of the United States to a State Court is necessary, to enforce affirmative action by a State Court, to allow a cause to be removed, in an ordinary case of the removal of a cause before judgment; and, therefore, a Court of the United States has no jurisdiction to issue such *mandamus*.

Under the Act of July 27th, 1868, a petition for removal must be regarded as being filed in the State Court when it is presented to that Court with the proper surety; and, when the proper petition is so presented, with the proper

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surety, so that that Court acts upon the matter judicially, in any way whatever, whether that Court accepts the surety or not, unless it puts its refusal upon some valid defect in the petition, or some insufficiency in the surety, it loses jurisdiction of the cause *eo instanti*.

Where, in a petition for removal under the Act of July 27th, 1868, the defendants petitioning comply with the Act, by setting out that they have a defence in the suit, arising under the Constitution of the United States and the laws of the United States, that averment must, in the Court of the United States, be accepted as true, until it is disposed of on the trial of the case.

Where a suit is removed into this Court, under the Act of July 27th, 1868, as respects all the parties to it, and all the subject-matter involved in it, all further proceedings in it in the State Court are void; and, although the State Court may be proceeding further in it at the instance of a party to it, it is not necessary to the exercise of the jurisdiction of this Court, that it should make an order staying all proceedings in the suit, by such party, in the State Court, and, therefore, such order will not be made.

This Court will not stay proceedings in a State Court which are null and void; and it is forbidden by the 5th section of the Act of March 2d, 1793, (1 *U. S. Stat. at Large*, 334, 335,) to stay valid proceedings in a State Court.

(Before BLATCHFORD, J., Southern District of New York, April 6th, 1869.)

THIS case came before the Court on a motion, on the part of the defendants, to stay all proceedings on the part of the plaintiff, as against any and all of the defendants, in the Supreme Court of the State of New York.

Edwin W. Stoughton and *David Dudley Field*, for the plaintiff.

Samuel J. Tilden, *Charles Tracy*, and *Clarence A. Seward*, for the defendants.

BLATCHFORD, J. This suit was originally instituted in the Supreme Court of the State of New York, by the plaintiff, Fisk, against the Union Pacific Railroad Company, a corporation organized under a law of the United States, and not a banking corporation, and twenty-three other defendants. It is alleged that four other defendants have since been brought in, by proceedings in the State Court. The motion now made is founded on the idea that the suit is one now pending in this Court, in which the plaintiff who commenced the suit in

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the State Court is plaintiff, and all the defendants who have been made defendants in it, in the State Court, are defendants. The suit was not commenced in this Court by the service of process of any kind; but jurisdiction over it, if acquired at all by this Court, has been acquired by a process of removal, exercised under an Act of Congress, passed on the 27th of July, 1868, (15 *U. S. Stat. at Large*, 226, 227.) So far as I am aware, this is the first case which has been brought up in any Court of the United States, or in any State Court, under this statute. In some respects, this statute differs from all other statutes on the subject of the removal of cases into the Courts of the United States, and in some respects it is similar to them.

The first question that arises for consideration upon the motion is, whether this case is in this Court—whether this Court has jurisdiction of the case. This question necessarily arises, and must be decided at the outset; because, if this Court has no jurisdiction of the case, it has no power to entertain the motion that is made, no power to make any order either granting or denying the motion, and no power to make any order whatever in the case, except to dismiss it for want of jurisdiction. (*The Mayor v. Cooper*, 6 *Wallace*, 247, 250.) The order that is now asked for is not an order outside of the case, but an order in the case. I proceed, therefore, to consider whether this Court has jurisdiction of the case. The question of jurisdiction was argued very fully, on the motion, by the counsel for the respective parties. The grounds urged by the counsel for the plaintiff, against the jurisdiction of the Court, were, (1.) That the whole suit is not in this Court; (2.) That no part of the suit is in this Court; (3.) That, under the Act of 1868, a suit cannot be removed into this Court, except on the petition of all of the defendants in it; (4.) That the suit, to be removable, under the Act of 1868, must be brought for a liability of the Union Pacific Railroad Company, and also for a liability of all the other defendants, as members of such Company; (5.) That the petition for removal presented to the State Court was not properly verified

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by oath, by any defendant; (6.) That the suit was not brought in the State Court for any liability, or alleged liability, of said Company.

As was well observed by one of the counsel for the defendants, the cases of removal of suits from the State Courts to the Courts of the United States, provided for by Acts of Congress since the institution of the Government, arrange themselves naturally, and according to the provisions of the statutes, into two classes. One class is, where the right of removal is given by reason of the condition of citizenship or alienage in a party; and the other class is, where the right is conferred by reason of a subject-matter involved in the suit. The 12th section of the Judiciary Act of September 24th, 1789, (1 *U. S. Stat. at Large*, 79,) and the Act of July 27th, 1866, (14 *Id.*, 306,) and the Act of March 2d, 1867, (*Id.*, 558,) are statutes where the right of removal is made to depend upon citizenship or alienage. The Act of March 2d, 1833, (4 *U. S. Stat. at Large*, 632, 633,) for the removal of suits or prosecutions brought on account of acts done, or authority claimed, under the revenue laws of the United States, and the Act of March 3d, 1863, (12 *Id.*, 755, 756,) passed during the late rebellion, for the removal of suits or prosecutions for acts done, or omitted to be done, during the rebellion, by virtue of authority derived from the President of the United States, or any Act of Congress, and the Act now in question, passed July 27th, 1868, are statutes where the right of removal is made to depend upon subject-matter. The authority conferred upon Congress to pass such statutes as these three of 1833, 1863, and 1868, for the removal of causes where the jurisdiction depends upon the subject-matter, is conferred by the second section of the third Article of the Constitution of the United States, which provides, that the judicial power of the United States "shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority." That provision has been expounded by the Supreme Court of the United States, in some memorable cases, and

PART I. THE FIRST FEDERAL BANKING COMPANY

STATE THAT A BANK WAS INCORPORATED WITH WELL-DEFINED AND WELL-DETERMINED POWERS, MAKING A PERFECTLY CLEAR AND CERTAIN LAW FOR THE GUIDANCE OF THE COURTS IN UNDER THIS JURISDICTION THAT THE POWER OF THE UNITED STATES extends. IN THE CASE OF THE FIRST FEDERAL BANKING COMPANY, THERE CAN BE NO DOUBT WHATSOEVER, THAT IT WAS WITHIN THE CONSTITUTIONAL POWER OF CONGRESS TO PASS THE ACT OF THE 17TH OF JULY, 1848. IT IS IN NO RESPECT DIFFERENT IN PRINCIPLE OR CHARACTER, IN ITS SCOPE, OBJECT AND PURPOSE, OR IN THE BASIS ON WHICH IT RESTS FROM THE ACT OF 1833 AND THE ACT OF 1842. *The Mayor v. Cooper*, 6 Wallace, 347, 354;) and, for the purpose of expressing distinctly the views that this Court entertains on this subject, I shall proceed to state those views at some considerable length.

The case which settles the principle to which I have referred, authoritatively and distinctly, is the case of *Osborn v. The Bank of the United States*, (9 Wheaton, 733.) In that case, the Act of Congress, incorporating the Bank of the United States, conferred upon it the capacity to sue in any Circuit Court of the United States; and the question arose for decision, whether the clause which authorized the Bank to sue in the Federal Courts was constitutional, under the provision of the Constitution to which I have referred. The Bank had come into the Federal Court in Ohio, by virtue of that clause in its Act of incorporation, and brought a suit in equity against certain individuals, praying relief. The relief was granted, and the defendants appealed to the Supreme Court. The opinion of that Court was delivered by Chief Justice Marshall. The question, as stated by him, (page 819,) was, whether the suit was a case arising under a law of the United States. The objection made against the jurisdiction of the Federal Court was, that several questions might arise in the case which depended on the general principles of law, and not on any Act of Congress. In regard to this, the Chief Justice says: "If this were sufficient to withdraw a case from the jurisdiction of the Federal Courts, almost every case, although involving the construction of a law, would be withdrawn, and a clause in the Constitution, relating to a subject

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removal, or whether it be called appellate, is of no consequence. That the jurisdiction exists, to be exercised by way of removal of the case to the Federal Court, there can be no doubt. The Chief Justice proceeds, (*page* 821): "We ask, then, if it can be sufficient to exclude this jurisdiction, that the case involves questions depending on general principles? A cause may depend on several questions of fact and law. Some of these may depend on the construction of a law of the United States, others on principles unconnected with that law." He also says, (*page* 822): "The judicial power of the Union extends effectively and beneficially to that most important class of cases, which depends on the character of the cause. On the opposite construction, the judicial power never can be extended to a whole case, as expressed by the Constitution, but to those parts of cases, only, which present the particular question involving the construction of the Constitution or the law. We say, it never can be extended to the whole case, because, if the circumstance that other points are involved in it shall disable Congress from authorizing the Courts of the Union to take jurisdiction of the original cause, it equally disables Congress from authorizing those Courts to take jurisdiction of the whole cause, on an appeal, and thus will be restricted to a single question in that cause, and words obviously intended to secure to those who claim rights under the Constitution, laws, or treaties of the United States, a trial in the Federal Courts, will be restricted to the insecure remedy of an appeal upon an insulated point, after it has received that shape which may be given to it by another tribunal, into which he is forced against his will." This view applies equally to a jurisdiction acquired by removal, because the jurisdiction intended by the Constitution, and, as I think, purposely carried out by Congress, in the Acts of 1833, 1863, and 1868, is a jurisdiction not restricted to the single question which arises under the Constitution, laws, or treaties of the United States, but is a jurisdiction under which the cause is transferred to a Court of the United States, where such question exists as an ingredient in the cause. The Chief Justice

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proceeds, (*page* 823): "We think, then, that when a question to which the judicial power of the Union is extended by the Constitution, forms an ingredient of the original cause, it is in the power of Congress to give the Circuit Courts jurisdiction of that cause, although other questions of fact or of law may be involved in it." This view is confirmed by the opinion of the Supreme Court, in the case of *The Mayor v. Cooper*, (6 *Wallace*, 247, 252.) A jurisdiction of that character and extent can, as a matter of course, be given as well by the process of removal as by the original institution of the suit in the Federal Court, or as by an appeal or a writ of error. (*The Mayor v. Cooper, ut supra.*) If this were not so, it is perfectly obvious that a plaintiff would always have it in his power, by introducing into his suit, as causes of action, questions of fact or law that did not of themselves arise under the Constitution or laws of the United States, and by coupling them with other causes of action arising under the Constitution or laws, to deprive the Courts of the United States of all jurisdiction of the suit. That result would ensue, if the jurisdiction be restricted to the question which arises under the Constitution or laws, unless the incongruity were admitted, of transferring a part of a cause into one Court, and leaving the rest of it in another Court.

The Chief Justice then proceeds to say—and I cite these observations of his, because they are quite applicable to the present cause, in many of its aspects: "The case of the bank is, we think, a very strong case of this description. The charter of incorporation not only creates it, but gives it every faculty which it possesses. The power to acquire rights of any description, to transact business of any description, to make contracts of any description, to sue on those contracts, is given and measured by its charter, and that charter is a law of the United States. This being can acquire no right, make no contract, bring no suit, which is not authorized by a law of the United States. It is not only itself the mere creature of a law, but all its actions, and all its rights, are dependent on the same law. Can a being, thus constituted, have a case

which does not arise literally, as well as substantially, under the law?" He then proceeds to argue that proposition and demonstrate it very fully. The conclusion arrived at was, that the clause in the Act incorporating the bank, enabling it to sue in the Courts of the United States, was consistent with the Constitution, and was to be obeyed in all Courts.

The conclusion at which the Supreme Court arrived in that case, was cited and applied in this Court, by Mr. Justice Nelson, in the case of *Murray v. Patrie*, (5 *Blatchf. C. C. R.*, 343,) decided in July, 1866. In his opinion in that case he says: "The question of the removal of causes from the State Courts to the Circuit Courts of the United States, was discussed very much in *Martin v. Hunter's Lessee*, (1 *Wheaton*, 346 to 350,) and no doubt was entertained that it might take place after as well as before judgment. It was again commented upon in the case of *Osborn v. The Bank of the United States*, (9 *Wheaton*, 821 to 828,) and especially by Mr. Justice Johnson, in his dissenting opinion, (*pages* 884 to 889). Mr. Justice Johnson was inclined to the conclusion, that Congress could not confer original jurisdiction upon the Circuit Courts of the United States, either directly, or by removal from State Courts, in cases arising under the Constitution, the laws of the United States, and treaties, &c., inasmuch as the Federal Court must assume the jurisdiction upon the simple hypothesis that such question had arisen, and that, until such question had actually arisen, and was presented for decision, the case was exclusively cognizable in the State Court. This view led the learned justice to maintain, that the question could be brought properly before the Federal Court, only under the 25th section of the Judiciary Act, as it could not be ascertained whether the case had actually arisen, till it was heard and decided. The Chief Justice, who delivered the opinion of the Court, held, that jurisdiction could be entertained, when the question assumed such a form that the judicial power was capable of acting on it; that it then became a case; and that the judicial power extended to all cases arising under the Constitution, &c." I cite these remarks, to

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show the view entertained by Mr. Justice Nelson, as to the proper construction of the decision in the case of *Osborn v. The Bank of the United States*, and as to the constitutionality of the exercise of the power of removal, and as to the circumstances under which a case arises, so as to be capable of removal.

The same principle was held by Mr. Justice Washington, in the case of *The Bank of the United States v. The Northumberland, &c., Bank*, (4 Wash. C. C. R., 108,) in which a suit was brought by the Bank of the United States, a corporation created by a law of the United States, under the power, conferred by its charter, to bring a suit in the Circuit Court of the United States. Mr. Justice Washington held, that the power to bring the suit existed. He uses this language: "That this is a case arising under a law or laws of the United States, is unquestionable. It never could have arisen, if the legislature, in the exercise of its constitutional authority, had not incorporated the Bank of the United States." This view, taken by him in 1821, is the same view which was taken by the Supreme Court, in the case of *Osborn v. The Bank of the United States*, in 1824.

I have referred to the three statutes of 1833, 1863, and 1868, as being statutes very much *in pari materia* upon the subject of removing causes from the State Courts, where the jurisdiction depends on the subject-matter, and arises under the clause of the Constitution which I have cited. A more particular reference to these statutes will be useful. The third section of the Act of March 2d, 1833, was, as is well known, passed in consequence of the attitude of nullification assumed by the State of South Carolina at that time. It was passed during the administration of President Jackson. There is one feature about the third section of this Act, in which it differs from all the other Acts, providing for the removal of causes, that have ever been passed by Congress. In all other Acts, the party desiring the removal is sent, by express enactment of Congress, to take the initiative for the purpose in the State Court, by filing a petition in the State Court and offering surety there,

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and, until he has done those acts in the State Court, he has no right to enter this Court. But, by this Act of 1833, in consequence of the hostile attitude assumed by South Carolina, the action toward a removal is entirely confined to action in the Federal Court; and the Act of Congress addresses the State Court solely by inhibition. It does not send the defendant to the State Court to present any petition, or offer any surety, but it acts on the State Court only by inhibition, and by a writ of *certiorari*, or a writ of *habeas corpus cum causa*, issued by the Federal Court. It provides that, "in any case where suit or prosecution shall be commenced in a Court of any State, against any officer of the United States, or other person, for or on account of any act done under the revenue laws of the United States, or under color thereof, or for or on account of any right, authority, or title, set up or claimed by such officer, or other person, under any such law of the United States, it shall be lawful for the defendant in such suit or prosecution, at any time before trial, upon a petition to the Circuit Court of the United States in and for the district in which the defendant shall have been served with process, setting forth the nature of such suit or prosecution, and verifying the said petition by affidavit, together with a certificate signed by an attorney or counsellor at law of some Court of record of the State in which such suit shall have been commenced, or of the United States, setting forth that, as counsel for the petitioner, he has examined the proceedings against him, and has carefully inquired into all the matters set forth in the petition, and that he believes the same to be true; which petition, affidavit and certificate shall be presented to the said Circuit Court, if in session, and if not, to the clerk thereof at his office, and shall be filed in said office, and the cause shall thereupon be entered on the docket of said Court, and shall be thereafter proceeded in as a cause originally commenced in that Court; and it shall be the duty of the clerk of said Court, if the suit were commenced in the Court below by summons, to issue a writ of *certiorari* to the State Court, requiring said Court to send to the said Circuit Court the record and proceedings in said cause; or, if it were commenced by

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capias, he shall issue a writ of *habeas corpus cum causa*, a duplicate of which said writ shall be delivered to the clerk of the State Court, or left at his office by the marshal of the district, or his deputy, or some person duly authorized thereto; and, thereupon, it shall be the duty of the said State Court to stay all further proceedings in such cause, and the said suit or prosecution, upon delivery of such process, or leaving the same, as aforesaid, shall be deemed and taken to be moved to the said Circuit Court, and any further proceedings, trial, or judgment therein, in the State Court, shall be wholly null and void." It is thus put in the power of the Federal Court to acquire and maintain its jurisdiction completely and entirely by action within itself. The issuing of the writ of *certiorari*, requiring the State Court to send to the Circuit Court the record and proceedings, seems to be merely a mode of notifying the State Court; because, by the fourth section of the same Act, provision is made for supplying to the Federal Court, by affidavit, the absence of certified copies from the State Court of the record and proceedings therein. (*Abranches v. Schell*, 4 *Blatchf. C. R.*, 256, 260.) When the process is delivered to or left at the office of the clerk of the State Court, the case is thereby *ipso facto* removed to the Circuit Court. No return to the writ is necessary; but, when the writ is thus served on the State Court, it becomes the duty of the State Court to stay all further proceedings in the cause, and any further proceedings therein, in the State Court, become wholly null and avoid.

It is quite apparent, that the jurisdiction which Congress intended to give, under this Act of 1833, where a suit or prosecution is commenced against any officer of the United States, or other person, for or on account of any act done under the revenue laws of the United States, or under color thereof, or for or on account of any right, authority, or title set up or claimed by such officer, or other person, under any such law of the United States, is to be such a jurisdiction, that a plaintiff in a State Court shall not be able to deprive such officer or other person, who is sued on account of an act done under the revenue laws, of the right to remove the suit into a Court of

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the United States, under this statute, by joining with him in the same suit other defendants who are not sued on account of acts done under the revenue laws. Thus to deprive the Federal Court of jurisdiction of the case, would be to deprive the officer or person justifying under the revenue laws, of the power to have his rights adjudicated from the commencement by the Federal Court, and to compel him to follow the case through the State Courts in all of its stages, and finally take it, under the 25th section of the Judiciary Act, to the Supreme Court of the United States. No such construction of this law has been admitted, so far as I am aware. The manifest intent of this statute, in saying that "it shall be the duty of the said State Court to stay all further proceedings in such cause, and the said suit, or prosecution, upon delivery of such process, or leaving the same, as aforesaid, shall be deemed and taken to be moved to the said Circuit Court, and any further proceedings, trial, or judgment therein in the State Court, shall be wholly null and void," is to remove *the suit*. The suit goes into the Federal Court, with all the parties to the suit. Every party to the suit is brought into the Federal Court when the suit is brought there, and the Court, in obtaining jurisdiction of the suit, obtains jurisdiction over all the parties to it. It is plain that this must be the construction of the Act of 1833, or it would be mere waste paper. Otherwise, a plaintiff would have it in his power to deprive an officer of the United States, who justified his acts under the revenue laws, from ever removing the cause into the Federal Court, by joining with such officer, as a defendant, some other person, on other causes of action, no matter how incongruous or irrelevant.

The same principle applies to the Act of March 3d, 1863. The 5th section of that Act provides: "If any suit or prosecution, civil or criminal, has been or shall be commenced in any State court, against any officer, civil or military, or against any other person, for any arrest or imprisonment made, or other trespasses or wrongs done or committed, or any act omitted to be done, at any time during the present rebellion, by virtue or under color of any authority derived from, or exercised by, or under, the President

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of the United States, or any Act of Congress, and the defendant shall, at the time of entering his appearance in such Court, or, if such appearance shall have been entered before the passage of this Act, then at the next session of the Court in which such suit or prosecution is pending, file a petition stating the facts, and verified by affidavit, for the removal of the cause for trial at the next Circuit Court of the United States to be holden in the district where the suit is pending, and offer good and sufficient surety for his filing in such Court, on the first day of its session, copies of such process and other proceedings against him, and also for his appearing in such Court and entering special bail in the cause, if special bail was originally required therein, it shall then be the duty of the State Court to accept the surety and proceed no further in the cause or prosecution, and the bail that shall have been originally taken shall be discharged; and, such copies being filed, as aforesaid, in such Court of the United States, the cause shall proceed therein in the same manner as if it had been brought in said Court by original process." The section then provides for removing the case by appeal, after final judgment, during the session or term of the Court at which judgment was rendered. It provides also for removing the case, within six months after judgment, by writ of error. That was what was done by the process which was issued in the case of *Murray v. Patrie*, to which I have referred. That was a writ of error issued under this section, within six months after the judgment was rendered in the State Court. The section then goes on to say: "and the said Circuit Court shall thereupon proceed to try and determine the facts and the law in such action." This Act thus provides for removing the whole suit, no matter who the parties are, and no matter what relief is sought to be obtained in the suit, provided there is found in the suit, as an ingredient therein, a claim against an officer, or any other person, for any arrest or imprisonment made, or other trespasses or wrongs done or committed, or any act omitted to be done, at any time during the rebellion, under color of any authority derived from, or exercised by, or under, the President of the United

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States, or any Act of Congress. If such ingredient is found in the suit, the whole suit goes into the Federal Court. If this were not so, then, as in the case of the Act of 1833, a plaintiff could deprive a party of all remedy under this statute.

We come now to the Act of 1868, under which the proceedings for removal in this suit were instituted. This is an Act in which the jurisdiction is founded on subject-matter. The second section of the Act provides, that "any corporation or any member thereof, other than a banking corporation, organized under a law of the United States, and against which a suit at law or in equity has been or may be commenced, in any Court other than a Circuit or District Court of the United States, for any liability or alleged liability of such corporation, or any member thereof, as such member, may have such suit removed from the Court in which it may be pending, to the proper Circuit or District Court of the United States, upon filing a petition therefor, verified by oath, either before or after issue joined, stating they have a defence arising under or by virtue of the Constitution of the United States, or any treaty or law of the United States, and offering good and sufficient surety for entering in such Court, on the first day of its session, copies of all process, pleadings, depositions, testimony, and other proceedings in said suit, and doing such other appropriate acts as are required to be done by the Act entitled, "An Act for the removal of causes in certain cases from State Courts," approved July twenty-seventh, eighteen hundred and sixty-six; and it shall be thereupon the duty of the Court to accept the surety, and proceed no further in the suit; and, the said copies being entered as aforesaid, in such Court of the United States, the suit shall then proceed in the same manner as if brought there by original process." Under this Act of 1868, as well as under the Acts of 1833 and 1863, if the suit comes into this Court at all, as to any person, it must come as an entirety. There can be nothing of it here, unless the whole of it is here; and, if any of it is here, there can be nothing of it left in the State Court. This is necessary, and must have been intended by Congress, in the Act of 1868, because of the subject-

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matter, which is the foundation of the jurisdiction of this Court, and because, otherwise, it would be in the power, as already suggested, of any plaintiff to deprive a corporation, organized under a law of the United States, which has a defence arising under or by virtue of the Constitution of the United States, or any treaty or law of the United States, of the power to remove the suit to this Court, by simply joining with the claim for relief against such corporation, because of an alleged liability of such corporation, some other right of action against some other defendant in the suit.

The Act of July 27th, 1866, introduces a new principle, which did not exist under the Act of September 24th, 1789, in regard to the removal of suits in cases where the right of removal is given because of the condition of alienage or citizenship in a defendant. This Act of 1866 provides for the removal, in certain cases, into the proper Federal Court, of a cause, as against an alien or a defendant who is a citizen of a State other than that in which the suit is brought, who petitions for such removal; and it expressly enacts, that such removal, as against such petitioning defendant, shall not be deemed to prejudice or take away the right of the plaintiff to proceed at the same time with the suit in the State Court, as against the other defendants, if he shall desire to do so. The power of removal under this Act of 1866 is limited, however, to cases where the suit, so far as relates to the alien defendant, or to the defendant who is the citizen of a State other than that in which the suit is brought, is instituted for the purpose of restraining or enjoining him, or is one in which there can be a final determination of the controversy, so far as it concerns him, without the presence of the other defendants as parties in the cause. It is quite manifest, that the principle introduced by this Act of 1866, of proceeding with the suit in the Federal Court as against the removing defendant, and proceeding at the same time with the suit in the State Court as against the non-removing defendants, has no application to the Acts of 1833, and 1863, and 1868. Under those Acts, if any part of the suit remains in the State Court, the whole of

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it remains there ; and, if any part of it goes to the Federal Court, the whole of it goes there.

The question that now arises for consideration, is as to the proper construction of the second section of this Act of 1868. That section provides, that any corporation, or any member thereof, other than a banking corporation, organized under a law of the United States, and against which a suit at law or in equity has been or may be commenced, in any Court other than a Circuit Court or a District Court of the United States, for any liability, or alleged liability, of such corporation, may have such suit removed from the Court in which it may be pending, to the proper Circuit Court or District Court of the United States, upon taking certain proceedings. Under this provision, and in analogy to the provisions of the Acts of 1833 and 1863, it is only necessary that a suit, at law or in equity, shall be commenced in a Court other than a Circuit Court or a District Court of the United States, against a corporation other than a banking corporation, organized under a law of the United States, for a liability, or alleged liability, of such corporation. That is all that is necessary, in the first place, to authorize the suit to be removed ; and the proper construction of the provision is, that where such a suit is commenced, for such a liability, or alleged liability, if the corporation designated is brought within the Act, in other respects, it cannot be deprived of the right to remove the suit, because there are joined in the suit with such cause of action against the corporation, other and additional causes of action against the corporation, which are not for a liability, or alleged liability, of the corporation, or causes of action against other defendants, which do not involve a liability, or alleged liability, of the corporation, or of some member thereof, as such member. Of course, the main point upon which the jurisdiction by removal is made by this statute to depend, is the averment, to be made in the petition, provided for afterward, that the corporation, or the member thereof, as such member, has a defence, arising under or by virtue of the Constitution of the United States, or some treaty or law of the United States. But,

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so far as the cause of action which is spoken of in the section is concerned, it is to be a cause of action for a liability, or alleged liability, of the corporation, or of a member thereof, as such member. If such a cause of action against the corporation appears by the papers in the suit, the case is one within the statute, even though other causes of action are joined, which are not for a liability, or alleged liability, of the corporation. Otherwise, the statute might be nullified, at the will of the plaintiff, by joining all kinds of causes of action, no matter how incongruous.

Such being the character of the suit, the next question is, as to who can institute proceedings for the removal of the suit. This may be done by the corporation, or by any member of it. Where the member petitions for the removal, he must be a member who was a member when the suit was commenced in the State Court. The ownership of stock in a corporation is necessary to membership, within the meaning of this statute. Subject to these constructions, the initiative to remove the suit may be taken by the corporation, or by any member of it.

The mode of removal prescribed by the Act is, that the petition is to be made by the corporation, or by a member thereof, and is to be verified by oath, and is to be presented to the Court in which the suit is commenced, and is to be so presented, either before or after issue is joined, and is to be filed in such Court, and is to state the existence of a defence, arising under or by virtue of the Constitution of the United States, or a treaty or law of the United States; and the petitioner must offer to such Court good and sufficient surety for entering in the Federal Court, on the first day of its session, copies of all the proceedings in the suit, and doing such other appropriate acts as are required to be done by the act of July 27th, 1866, such as, appearing in the Federal Court, and, if necessary, entering special bail in such Court in the cause. The Act of 1868 then says: "and it shall be, thereupon, the duty of the Court to accept the surety, and proceed no further in the suit; and the said copies being entered, as aforesaid,

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in such Court of the United States, the suit shall then proceed in the same manner as if it had been brought there by original process."

In regard to all the Acts for the removal of causes, the Acts of 1789, 1833, 1863, 1866, 1867, and 1868, the same principle applies, in this particular—that the right to remove is a right which is conferred upon the party directly by the Act of Congress, and depends in no manner upon the volition, or action, or non-action, of the State Court. If this were not so, the statutes would be mere waste paper. Under these Acts, where surety is required to be given, the party is required to offer to the State Court good and sufficient surety, and the State Court is required, if the surety is good and sufficient, to accept it, and to proceed no further in the suit. The State Court cannot defeat the right of removal, by refusing to act upon the question at all, or by refusing to accept the surety, unless it puts the refusal to allow the case to be removed, on the ground that the surety is insufficient. Undoubtedly, there is a discretion, a legal discretion, to be exercised by the State Court, in respect to the sufficiency of the surety. But it was held by the Supreme Court, in the case of *Kanouse v. Martin*, (15 *Howard*, 198,) as a definitive disposition of the question, that the right of removal is conferred on a party by the Act of Congress, and that, although he is required to take certain proceedings, by filing a petition in the State Court and offering proper surety, yet, when he has done so, if the State Court thereafter proceeds with the case, the case is *coram non judice* in the State Court, and all its proceedings are utterly void. This is, unquestionably, the proper interpretation of the Acts of Congress, all of which are alike, so far as any action is to be had in the State Court to secure a removal. The intention is to secure a removal on a compliance with the statute, without the exercise of the pleasure or will of the State Court, in any manner whatever. While the State Court cannot, by refusing an order of removal, prevent a party from effecting the removal, it adds nothing whatever to the right of removal, or to the jurisdiction of this Court, to pro-

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cure an order from the State Court, allowing the removal, provided, always, that the provisions of the Act of Congress are complied with. An order refusing a removal cannot prevent a removal, nor can an order granting a removal promote a removal. Neither order can affect the jurisdiction of this Court in any manner whatever. The Act of 1833, as before remarked, has special provisions, providing for coming into the Federal Court, and doing every thing there. But, in all the other Acts, from that of 1789 down, the principle is plainly written on the face of all the statutes, that, when the petition is filed, verified by oath, stating the things which the statute requires—be it alienage, or citizenship, or a defence arising under the Constitution of the United States, or a treaty or law of the United States, or a trespass committed under authority derived from the President of the United States during the late rebellion, or inability, from prejudice or local influence, to obtain justice in the State Court—and when good and sufficient surety is offered for doing what the statute requires to be done, the right of removal is perfected. From that time, the State Court can do nothing further in the suit, but accept the surety. The Act of 1868 says: “and it shall be, thereupon, the duty of the Court to accept the surety, and proceed no further in the suit.” It then adds: “and, the said copies being entered, as aforesaid, in such Court of the United States, the suit shall then proceed in the same manner as if it had been brought there by original process.” Now, where a defendant, who has a clear case for removal, files his petition in the State Court, and offers proper surety, and obtains from that Court an order to remove the cause, it becomes thereupon the duty of the State Court to proceed no further in the suit. The case is out of the jurisdiction of the State Court, but, at the same time, this Court cannot proceed in it, until copies of the proceedings in the State Court are entered here. But the plaintiff, in such a case, is not at the mercy of the defendant; because, if the case is a proper one for removal, the plaintiff himself can enter the papers in this Court, and the case will proceed here. At a certain stage,

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the case may be considered as being in neither Court, because it is on its transit from the one to the other. The State Court is inhibited, by the statute, from proceeding in it, while, at the same time, the Federal Court cannot proceed in it, because the papers are not yet entered there. Therefore, no difficulty can arise from the failure of the defendant to enter the papers in this Court. The sole object of requiring the surety is, that good faith may be observed, and that no defendant shall be allowed to avail himself of the privilege of removal, who is not able to furnish good and sufficient surety for coming into the Federal Court, at the earliest possible day, and submitting himself to the jurisdiction which he has invoked.

Such is my view of this Act of 1868. I have referred to the other statutes, on the subject of removal, because the system is one which has been in operation since the year 1789, and has been acted upon throughout, by Congress, on one principle, namely, that the jurisdiction of the Federal Courts, in cases of removal, shall in no manner depend on what a State Court may do, or omit to do.

In the case of *Murray v. Patrie*, before referred to, a writ of error was issued by this Court, under the Act of 1863, in pursuance of the provision of that Act, that "it shall be competent for either party, within six months after the rendition of a judgment in any such case, by writ of error or other process, to remove the same to the Circuit Court of the United States of that district in which such judgment shall have been rendered." The words, "writ of error," were used by Congress, in that Act, in their common law sense; and, when an Act of Congress says, that it shall be lawful for a party to remove a judgment by writ of error, the expression necessarily implies that the usual course in regard to a writ of error is to be observed. The judgment is to be removed by the writ of error, but it is not removed by the mere issuing of the writ of error. As in the case of all writs of error, there must be a return to the writ of error. In the case referred to, a writ of error was issued by this Court, and served

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upon the clerk of the State Court, which was the Supreme Court of the State of New York. He refused to make a return to the writ, and desired to bring before this Court, for decision, the question whether the case was one in which this Court had jurisdiction to issue the writ of error, and whether the Act of Congress was constitutional. For that purpose, an order was made, in the first instance, requiring the clerk of the Supreme Court of the State of New York, for the county of Greene, in the Third Judicial District, to show cause why he should not make a return to the writ. The matter was thoroughly argued, and it was on that hearing that Mr. Justice Nelson gave the opinion to which I have referred. As the result of it, he directed that an order should be issued, requiring the clerk of the Supreme Court of New York to make a return to this Court, on the writ of error. The clerk still refused to make the return, and then the question came up, before Mr. Justice Nelson, as to what should be done. On the view that it was necessary that this Court should have a return to the writ of error, in order to exercise its jurisdiction in the case, he issued, sitting in this Court, a writ of alternative *mandamus* to the Supreme Court of the State of New York. I have before me the original writ of alternative *mandamus*, the allowance of which is signed by him, and bears date on the 16th of October, 1866. That writ was served on the clerk of the Supreme Court, for the county of Greene, on the 18th of October, 1866. It is addressed to the Justices of the Supreme Court of the State of New York, for the Third Judicial District, and for the county of Greene, and to the clerk of the county of Greene, and of the Supreme Court therein, and recites the recovery of the judgment in the Supreme Court of New York, and that a writ of error has been allowed by this Court on the judgment, with a citation and a proper bond, for the removal of the action into this Court, to the end that this Court may proceed to try and determine the facts and the law therein. It recites, also, that it has been represented to this Court, that, after the rendition of the judgment, the State Court refused to allow the action

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to be removed into this Court. It then proceeds: "Whereupon, the said Circuit Court being willing that justice shall be done, you are hereby commanded, that you make due and legal return to said writ, as required by law, and that you do allow said action to be removed and transferred into the said Circuit Court of the United States for the Southern District of New York, and that you do proceed no further in said case, or, in default thereof, that you and each of you make known" to this Court, on a day therein named, "why you and each of you have not done the same." The writ is signed by the clerk of this Court, and has upon it the impress of the seal of the Court, and its allowance by the Court, as before mentioned. To that alternative *mandamus* the return and answer of the Justices of the Supreme Court was made. The return states, that it is made by way of showing cause why a peremptory *mandamus* should not issue. It recites all the proceedings in the State Court, and sets out all the facts of the case which were deemed necessary to raise the legal questions involved, and then concludes as follows: "Wherefore, the said Justices and clerk of said Supreme Court say, that the said Circuit Court of the United States has not acquired jurisdiction of the said suit, in favor of said Patrie against said Murray and Buckley, and cannot compel a removal of the same by said writ of error, and a new trial of the same in the said Circuit Court of the United States." To that return there was a demurrer, and a joinder in demurrer, and then this Court gave judgment by a judgment record, which sets out the alternative writ, the return, the demurrer, and the joinder in demurrer, and then proceeds as follows: "Whereupon, all and singular the premises being seen by the Court now here, and fully understood, and mature deliberation being thereupon had, for that it appears to the said Court, now here, that the said answer and return of the said Justices and clerk, and the matters therein contained, are not sufficient in law to quash the said alternative writ of *mandamus* of the said United States and the said relators, whereupon, the said United States and relators pray

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judgment, and also a writ of peremptory *mandamus*, to be directed to the said Justices and clerk, commanding them as in said alternative writ is specified: Wherefore it is considered, that a writ of peremptory *mandamus* do forthwith issue, directed to the said Justices and clerk, commanding them, upon pain and peril that shall fall thereon, to remove and transfer into the Circuit Court of the United States for the Southern District of New York, a certain judgment, and the record thereof, now remaining on file in the office of the said clerk, "describing the judgment particularly," according to the command of the said former writ of alternative *mandamus*, and that they do proceed no further in said cause." This judgment record is signed by Mr. Justice Nelson, and also by the clerk of this Court, and bears date on the 20th of November, 1866.

The object of that proceeding by *mandamus* was, to secure a return to the writ of error, on the idea that the jurisdiction of this Court, under the Act of 1863, on a writ of error, could not be exercised, unless a return was made to the writ of error. The proceeding by *mandamus* was, therefore, regarded by this Court as necessary to the exercise of its jurisdiction. So far as the judgment of this Court awards a peremptory *mandamus* directing the State Court to remove and transfer the judgment of the State Court, and the record thereof, into the Circuit Court of the United States, it awards a *mandamus* to remove the suit by a return to the writ of error. That is the point on which the jurisdiction of this Court to issue the writ of *mandamus* in that case depended; and it by no means follows, because the writ of *mandamus* was a proper remedy in the case of *Murray v. Patrie*, that it is at all a necessary or proper remedy in an ordinary case of the removal of a suit before judgment, under the statutes to which I have referred. Under those statutes, a writ of *mandamus* is not a necessary remedy. The case comes here without any writ of *mandamus*. A writ of *mandamus* would be a pure matter of supererogation, in any case of the kind, because the fact that the case comes

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here without any affirmative action by the State Court, and that no affirmative action of the State Court is necessary, shows that no *mandamus* from this Court is necessary to enforce any such affirmative action of the State Court. The inhibition of the Act of Congress, that the State Court shall proceed no further in the cause, is addressed directly to the State Court by the Act of Congress. As the jurisdiction of this Court, under the 14th section of the Judiciary Act of September 24th, 1789, (1 *U. S. Stat. at Large*, 81, 82,) to issue writs of *mandamus*, is, as has been determined in numerous cases, by the Supreme Court of the United States, confined to cases where such writs are necessary to the exercise of the jurisdiction of the Court, it follows, that it is not necessary, in any case of the removal of a cause from a State Court into this Court, except, perhaps, the case of a writ of error under the Act of 1863, that this Court should issue a *mandamus* to the State Court to remove the case, a *mandamus* not being necessary to the exercise, by this Court, of its jurisdiction over the cause.

I have referred, at some length, to this subject of a *mandamus*, because there are several cases, in the Courts of the United States, which seem to regard a writ of *mandamus* as an appropriate remedy in a case like the present one. But, in my view, it is never an appropriate remedy for a Circuit Court of the United States, unless it is a necessary remedy; and it is not a necessary remedy, unless it is necessary to uphold the exercise of the jurisdiction of the Court. Although what I have said on this subject is, in one sense, not strictly involved in the question now before the Court, yet the general subject of the remedy by *mandamus*, in a case like the present one, is so connected with the order that is asked for on this motion, that I have found it impossible to come to a satisfactory conclusion without considering the entire question.

The opinion delivered by Mr. Justice Barnard, in the State Court, on his refusal to allow this suit to be removed to this Court, states clearly the grounds of the refusal. He

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says: "A liability, or alleged liability, of such corporation, or any member thereof," referred to in the 2d section of the Act of 1868, "must, I think, be construed as sole liability, or sole alleged liability. It is very manifest, that Congress intended to transfer to the Federal Courts jurisdiction in cases where a corporation, or a member thereof, created by Federal laws, is sought to be made liable by reason of its corporate acts, or by reason of acts of members thereof charged as corporate acts. If this action were of that character, the right to removal could not be well disputed. If the sole object of this action was to compel the company to issue to the plaintiff the certain shares of the company, referred to in the complaint, the company would be entitled to a removal of the same. But an examination of the complaint shows that, in addition to this object, the plaintiff seeks to have set aside, and have declared illegal, certain transactions between the company and the Credit Mobilier of America, as frauds upon the stockholders of the company. Certainly, in this aspect of the case, it is not brought to enforce the liability of the company, but to set aside and annul certain transactions of the company, as *ultra vires*." He then proceeds to put his refusal to remove the case upon the ground that the action was brought to enforce a joint liability on the part of the company and of other defendants. In other words, he places his refusal on the ground, that there are coupled with a claim made by the plaintiff against the Union Pacific Railroad Company, for an account and payment to him, as a shareholder in the company, of his share in the profits and property of the company, other causes of action, against other parties, which are not for a liability of the corporation. He then says, in respect to the verification of the petition for removal, by the treasurer of the company, on its behalf, and by the petitioners Macy and Cisco, for themselves: "The petition and verification thereof as to the Union Pacific Railroad Company are regular. The same may be said as to the defendants Macy and Cisco." Nothing is said, in the opinion, upon the question of surety. The surety is not criticised in

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any way, as being insufficient. The whole case is put upon the construction of the statute. As to that, as I have already stated, I cannot concur with Mr. Justice Barnard. One other fundamental idea, I perceive, runs through his opinion, which is, that if the case comes into this Court as to the company, and as to Macy, and as to Cisco, the case, as to the remainder of the defendants, will be left in the State Court, which is, nevertheless, commanded, by the Act, to proceed no further in the suit. As to that point, also, as I have already stated, I do not concur in the opinion of Mr. Justice Barnard.

It appears by the papers entered in this Court, in the cause, by the defendants, that the petition for removal was originally presented to Mr. Justice Cardozo, of the Supreme Court, on the 31st of July, 1868. The verifications of the petition by the company, and by Cisco and Macy, bear date on the 30th of July. The petition, in all respects, fully complies with the requirements of the Act of 1868, so far as the company and Macy and Cisco are concerned, and states, in the body of it, that the petitioners "hereby offer good and sufficient surety, for entering in said Circuit Court of the United States for the Southern District of New York, on the first day of its session, copies of all process, pleadings, depositions, testimony, and other proceedings in said suit," &c. Appended to the petition, as entered in this Court, is a bond to the plaintiff, in the penalty of \$10,000, reciting the suit and the petition for removal, and conditioned as required by the Act of 1868. There are two sureties to it, each of whom justifies in the amount of its penalty, and it is acknowledged by the sureties. The bond, affidavits, and acknowledgment bear date on the 31st of July, 1868. On that day, Mr. Justice Cardozo, on the summons and complaint in the State Court, and the petition, made an order requiring the plaintiff to show cause, on the first Monday of August following, why the petition should not then be filed and the prayer thereof be granted, the prayer being, that the suit be removed to this Court, and that the said surety be accepted by the State Court, and that the State Court proceed no further in the suit. The petition for removal must have been

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presented to the State Court on or before the 6th of August, 1868, because, among the papers entered in this Court, in the cause, is an order, entitled in the suit, made by the Supreme Court, at a Special Term held on that day by Mr. Justice Barnard, reciting, that a motion had been made in this action, on due notice, based on the petition of the company for the removal of the cause to this Court, under and by virtue of the provisions of the Acts of Congress in such case made and provided, and that time to file papers in opposition to the motion had been given to the plaintiff, on his application, until the third Monday of August. Some time seems to have been occupied in taking testimony before a referee, to be used on the motion to remove the cause, and it does not appear at what time the motion was finally submitted to the judgment of the Court. An affidavit made for, and used on, the motion, states, that the petitioning defendants presented the petition to the State Court on the 3d day of August, 1868, "and then and thereupon offered in and to said Supreme Court good and sufficient surety, in pursuance of said Acts of Congress." The opinion of Mr. Justice Barnard, deciding the motion for removal, was filed on the 4th of March, 1869. The formal order of the State Court on the decision, is dated March 10th, 1869. It makes no reference whatever to the fact that any surety had been offered to the State Court. It refers merely to the summons, the complaint, the petition for removal, and sundry affidavits used on the motion for removal, and orders that the prayer of the petition be denied. The copy of the petition and the copy of the bond, which are entered in this Court, each of them bears an endorsement that it was filed March 13th, 1869. No other conclusion can be drawn from these facts, than that the bond, as surety, was offered to the State Court while the petition was pending before it; and no point is made, in the opinion of Mr. Justice Barnard, as to that fact, or as to the sufficiency of the surety. The petition being, as to its contents, in strict accordance with the Act of Congress, and being under the seal of the company, with an affidavit of its secretary that such seal is its seal, and was set

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thereto by him by its authority, and being signed by the treasurer of the company, and being, as Mr. Justice Barnard states in his opinion, verified as to the company, in the form authorized by the State practice, and the allegation in it being, as Mr. Justice Barnard also states, positive and not upon information and belief, a proper case for removal was made out. Under the Act of 1868, the petition for removal may be made by the company, or by any one member thereof. The petition in this case was made by the company, and it was also made by Cisco, a member thereof, and by Macy, a member thereof. It shows a suit pending against the corporation, for an alleged liability, within the statute ; and it is of no consequence that other causes of action are joined with that cause of action. The complaint in the State Court sets forth, that the plaintiff is the owner and holder of six shares of the capital stock of the defendants, the Union Pacific Railroad Company ; that the same stand in his name on the books of the company ; that he claims to be entitled, as against the company, by subscription, to twenty thousand other shares of its capital stock ; and that the directors of the company deny his right thereto, and refuse to give him certificates therefor. He demands judgment, that he may be declared to be a stockholder of the company, in respect to the twenty thousand shares, and to be entitled to an account of all the rights, property, and franchises of the company, at the time he subscribed for the twenty thousand shares, and to be allowed his just proportion thereof ; and that, until his rights are fully admitted, and the said accounting be had, and payment be made to him of all to which he may be entitled, the company be restrained, by injunction, from declaring, making, or paying, any dividend or division of any money or property among its stockholders, or any of them. In addition to this claim for a liability of the company, and this prayer for relief against the company, the complaint makes sundry allegations of fact, in reference to other defendants, on which it prays that those of the defendants who are directors, officers, and stockholders of the company, and have participated in the

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profits of the defendants the Credit Mobilier of America, be declared to be trustees thereof for the company and its stockholders, and held to account for the same; that the company be enjoined from delivering to the Credit Mobilier, and the Credit Mobilier from receiving, any bonds of the United States, or any grants of lands from the United States, or any bonds of the company issued under certain Acts of Congress; that all contracts made between the company and the Credit Mobilier, and between the company and the defendant Oakes Ames, be declared fraudulent, and be set aside; that the Credit Mobilier return to the company all property, or the proceeds thereof, received at any time by the Credit Mobilier from the company, or under any contract or transfer made by the company; and that the Credit Mobilier be enjoined from dividing any profits, money, or property among its stockholders, until the liabilities of its directors and stockholders to the company and its stockholders shall be, in such action, determined. The petition for removal avers, that the petitioners, who are the company, Cisco, Macy, and three others of the defendants, "have a defence in said suit arising under and by virtue of the Constitution of the United States, and the laws of the United States."

I am of opinion, therefore, that a case was made out for removal; that the State Court, *ipso facto*, lost jurisdiction of the case; and that, on the entering of the papers in this Court, it can proceed with the suit and with the whole suit. If all the proper papers have not as yet been filed here, the defect can be supplied; but, as far as I am advised, they all have been filed here. The petition for removal must be considered as having been filed in the State Court, within the meaning of the Act of 1868, when it was presented to the State Court with the bond, irrespective of the formal endorsements made on those papers, that they were filed on the 13th of March, 1869; for, otherwise, it would be in the power of the State Court to defeat a removal, by making a rule that a petition for removal should never be filed therein, when the State Court should refuse to grant its prayer. The Act of

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Congress cannot be evaded in that way. It is substantially what South Carolina did, under circumstances which caused the passage of the Act of 1833; and New York might do the same. When the proper petition is presented to the State Court, with the surety, so that that Court acts upon the matter judicially, in any way whatever—and, in this case, such presentation and action took place, as before shown, as early as the 6th of August, 1868—whether the State Court accepts the surety or not, unless it puts its refusal upon some valid defect in the petition, or some insufficiency in the surety, it loses jurisdiction of the cause *eo instanti*.

It was urged, on the motion, that there is, in fact, no defence in this case, arising under, or by virtue of, the Constitution of the United States, or any law of the United States, that the defendants themselves have so declared, and that the papers show the fact. There is a decision of this Court on that point, made by Mr. Justice Nelson, in the case of *Dennistoun v. Draper*, to which I have already referred. It was a case of a suit removed from a State Court into this Court, under the Act of 1833. That Act requires that, in the petition to this Court, the nature of the suit shall be set forth. A motion was made to this Court to remand the suit back to the State Court. The defendant, in his petition for removal, set forth that he was an officer, acting under the revenue laws of the United States, namely, a cotton agent at the city of New York, appointed by the Secretary of the Treasury, in pursuance of law, and that he was in possession of the cotton involved in the suit, and which was a replevin suit for the cotton, and held it as captured and abandoned property, under certain statutes of the United States. The motion to remand was founded on the ground that the defendant did not hold the cotton, at the time the replevin suit sought to be removed was brought, as an officer of the revenue laws, or as a person authorized to hold the cotton under such laws, but held it wrongfully, and in violation of the rights of the plaintiffs in it, and was simply a tortfeasor. Upon that point, Mr. Justice Nelson says: "If the petition

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and affidavit, with the certificate of counsel, failed to bring the cause within the Act of Congress providing for the removal, it would be the duty of the Court, on motion, to remand it; and such order has, also, not unfrequently been entered in cases where it appeared clearly, by the admission of the parties or otherwise, that they were not within the Act of removal. But, in cases where the proceedings are in conformity with the Act, the removal is imperative, both upon the State and the Circuit Court; and, if the facts are seriously contested, it must be done in a formal manner, by pleadings and proofs, in the latter Court. The question of jurisdiction belongs to the Federal Courts, and must be heard and determined there. The statute is peremptory, that 'the cause shall thereupon be entered on the docket of said Court, and shall be thereafter proceeded in as a cause originally commenced in that Court,' and 'shall be deemed and taken to be moved to the said Circuit Court, and any further proceedings, trial, or judgment therein in the State Court, shall be wholly null and void.' It is true, that the plaintiff, after the removal of the cause into the Circuit Court, has no means, according to the course of proceeding in that Court, to raise the question of jurisdiction upon the pleadings; and such disability, doubtless, furnishes some plausibility of reason for the hearing of the question upon motion. But this mode of presenting it, which must be upon affidavits, oftentimes conflicting and irreconcilable, is most unsatisfactory, and should not be entertained unless from unavoidable necessity, with a view to ascertain the appropriate tribunal to hear and determine the cause. I am of opinion that no such necessity exists." He then proceeds to show that the plaintiff can avail himself of the objection to the jurisdiction at any stage of the trial, and that if, when the evidence is closed, it shall appear that the cause is such as not to come within the cognizance of the Court, under the Act, it will be its duty to instruct the jury that the Court has no jurisdiction of the case, and to remand it back to the State Court. He further says: "The cause, therefore, in question, was properly instituted in the State Court, leaving the only question for

consideration, on this motion, as to the legal effect of the removal; and, as to that, I am of opinion, inasmuch as the Act of Congress has been fully complied with, it is not proper, if it be competent, for this Court to determine, upon motion, the disputed jurisdictional facts, involving the right or legality of the removal; and that, inasmuch as the question of jurisdiction involving them cannot be raised upon the pleadings, the proper place to hear and determine them is on the trial, where the plaintiffs will be at liberty to take advantage of the objection." The same view was taken by the Supreme Court in *The Mayor v. Cooper*, (6 Wallace, 247, 254.) As the defendants, the company, Cisco and Macy, have complied strictly with the Act of 1868, by setting out, in their petition, that they have a defence in the suit, arising under the Constitution of the United States and the laws of the United States, that averment must be accepted as true, until it is disposed of on the trial of the case. It cannot be inquired into on the present motion, or even on a motion to remand the cause to the State Court.

My conclusion, therefore, is, that the whole of this cause is in this Court, as respects all the parties to it and all the subject matter involved in it; and that no part of it is now in the State Court. Any proceedings which are going on in the suit in the State Court are void. Whether, as is alleged in an affidavit used on this motion, such proceedings are going on, or whether, as is claimed on the part of the plaintiff, whatever proceedings, connected with the suit, are now going on in the State Court, are not proceedings in the suit, are not questions now presented.

As this Court has jurisdiction of this suit, the next question is, whether the relief asked for by this motion shall be granted. The propriety of the action of this Court, either directly upon a State Court, or upon a party to a suit pending in this Court, has been discussed in various cases arising under the laws of the United States, in the Courts of the United States. Under the 14th section of the Judiciary Act, before referred to, which provides that the Courts of the United States shall have power to issue all writs which may

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be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law, and in view of the general principles of jurisprudence, this Court undoubtedly has power, with a view to the efficient exercise of its jurisdiction in this case, to resort to all means that are proper to enforce its jurisdiction. I refer, on this subject, to the case of *The Board of Commissioners of Knox County v. Aspinwall*, (24 Howard, 376,) and to the case of *Riggs v. Johnson County*, (6 Wallace, 166.) In the case last cited, a State Court in Iowa has issued an injunction to restrain the levying of a tax to pay a judgment recovered by one Riggs, in the Circuit Court of the United States for Iowa, against Johnson County, in Iowa, on certain bonds issued by that county. After the injunction had been issued, Riggs, by petition, applied to the said Circuit Court for a *mandamus* to the parties enjoined, who were officers of the State, to compel the levying of a tax sufficient to pay the amount of the judgment. In opposition to the application, the issuing of the injunction by the State Court was set up. Riggs demurred to such answer, assigning, as cause of demurrer, in substance, that, after the rendering of the judgment by the Circuit Court, the State Court had no jurisdiction to prevent him from using the process of the Circuit Court, by writ of *mandamus*, to collect his judgment. The Circuit Court overruled the demurrer, and Riggs carried the case, by writ of error, to the Supreme Court. That Court reversed the judgment and sustained the demurrer. It held, that the issuing of the *mandamus* by the Circuit Court, was to be regarded as a proceeding necessary to the exercise of the jurisdiction of the Circuit Court; that a Circuit Court of the United States can issue a writ of *mandamus*, in all cases where it may be necessary, agreeably to the principles and usages of law, to the exercise of its jurisdiction; and that it can issue such a writ to an officer of a State. To the same effect are the cases of *United States v. Council of Keokuk*, (6 Wallace, 514, 518.) The principle of those cases is, that this Court has power to issue a writ of *mandamus*, and to do

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any other act of a kindred character, when necessary to the exercise of its jurisdiction. These cases are all based upon the early case of *McIntire v. Wood*, (7 *Cranch*, 504,) which holds, that the power of the Circuit Courts of the United States to issue the writ of *mandamus*, while it exists in cases where the issuing of the writ is necessary to the exercise of its jurisdiction, is confined exclusively to such cases. In the opinion of the Court in that case, delivered by Mr. Justice Johnson, the following language is used: "We are of opinion, that the power of the Circuit Courts to issue the writ of *mandamus*, is confined exclusively to those cases in which it may be necessary to the exercise of their jurisdiction. Had the 11th section of the Judiciary Act covered the whole ground of the Constitution, there would be much reason for exercising this power in many cases wherein some ministerial act is necessary to the completion of an individual right, arising under laws of the United States, and the 14th section of the same Act would sanction the issuing of the writ for such a purpose. But, although the judicial power of the United States extends to cases arising under the laws of the United States, the legislature have not thought proper to delegate the exercise of that power to its Circuit Courts, except in certain specified cases. When questions arise under those laws in the State Courts, and the party who claims a right or privilege under them is unsuccessful, an appeal is given to the Supreme Court, and this provision the legislature has thought sufficient at present for all the political purposes intended to be answered by the clause of the Constitution which relates to the subject." The case just cited is the one upon which, under the 14th section of the Judiciary Act of 1789, it has been regarded as settled, that the remedy by a writ of *mandamus* from a Circuit Court of the United States, is to be invoked only where it is necessary to the exercise of the jurisdiction of the Court. Upon this subject, the remarks of Mr. Justice Woodbury, a very discreet and experienced Judge, long in public life, in the case of *Ladd v. Tudor*, (3 *Woodb. & M.*, 325, 332,) are exceedingly apposite. An application was made to the Circuit

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Court of the United States for the District of Massachusetts, to issue a *mandamus* to a State Court, to remove a cause therefrom, under the Act of 1789, where the plaintiff was a citizen of Massachusetts and the defendant was a citizen of New Hampshire, and where the State Court had refused to remove the cause. Mr. Justice Woodbury, in his opinion, says: "It may not be improper to add a few remarks more as to the use of this particular remedy in a case like this. Some doubt might exist, whether a *mandamus* to a State Court from this tribunal, organized under another government, was the proper remedy." He then cites the case, which has been referred to on this motion, of *Spraggins v. County Court of Humphries*, (*Cooke's Rep.*, 260,) and says that that case seems to countenance the application before him. He also cites the case of *Brown v. Crippen*, (4 *H. & M.*, 173,) and says, that, "although the marginal note of that case says that a *mandamus* would lie from the Circuit Court, no such opinion was there given; that it is only suggested whether a writ of *certiorari* might not lie from the Circuit Court; and that the counsel strenuously contended that no *mandamus* would lie from the Circuit Court, and that the latter had no jurisdiction over the case till it actually came there." He then refers to the case of *McIntire v. Wood*, (7 *Cranch*, 504,) and says, that, although that case speaks generally of the power of the Circuit Court to issue a *mandamus*, in order to sustain its jurisdiction, and although the decision in the case in *Cooke* rests on the power of superior Courts to enforce their jurisdiction over inferior ones by *mandamus*, yet it is very questionable whether a case like the one then before him ought to be considered within that principle. He adds: "It is a correct principle between inferior and superior Courts of the same government, but difficult to be upheld between Courts established by separate governments. If necessary to decide on this, it might require more grave consideration, before sustaining it in cases like this, because, being a mode of redress very likely to lead to jealousies and collisions between the States and General Government, of a character any thing but desirable."

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It is apparent, therefore, that this one idea runs through all the cases—that the remedy by *mandamus* will not be exercised by the Courts of the United States, except where it is necessary to their jurisdiction. On this principle, in a case of removal like the present, no *mandamus* is necessary to the exercise of the jurisdiction of this Court. This principle, embodied in the 14th section of the Judiciary Act of 1789, is carried, in spirit, into the 5th section of the Act of March 2d, 1793, (1 *U. S. Stat. at Large*, 334, 335,) which provides that no writ of injunction shall be granted by a Court of the United States, “to stay proceedings in any Court of a State.” This provision was intended by Congress to prevent conflicts between the State Courts and the Federal Courts, in cases where such conflicts were not absolutely necessary. Where a case goes up to the Supreme Court, from a State Court, under the 25th section of the Judiciary Act of 1789, and it is necessary to the exercise of the jurisdiction of the Supreme Court, that it should issue any particular process, of course it will issue it; and so this Court, where it is necessary to issue any process, will do so. It issued a *mandamus* in the case of *Murray v. Patrie*, because the issue of the writ was regarded as necessary to the exercise of the jurisdiction of this Court, with a view to secure a return to the writ of error.

In analogy to this principle, I do not regard it as proper to grant the order asked for in this case. Such an order is not necessary to the exercise of the jurisdiction of this Court. On the general principles of comity, irrespective of the Act of 1793, if this case is a case which the State Court regards as still remaining in that Court, and this Court shall issue an order restraining the plaintiff, under pains and penalties, from proceeding in the suit in the State Court, the State Court may grant an order to restrain the defendants, under pains and penalties, from proceeding in the suit in this Court. While the issuing of no process appropriate to a suit, and necessary to properly maintain the jurisdiction of this Court, will ever be intermitted by this Court, this Court will always sedulously

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abstain from inviting any of those conflicts which have a tendency to arise, under our mixed system of Government, between the Federal and the State Courts. We have proceeded for eighty years with very few of such judicial conflicts, and, with discretion, they may generally be avoided. Entirely irrespective, therefore, of the Act of 1793, my judgment is against the propriety of granting the order asked for.

But there is a further ground which seems to me conclusive against the motion. If this cause is, in fact, in the State Court, this Court is absolutely prohibited, by the Act of 1793, from staying the proceedings in the State Court. If this cause is not in the State Court, every thing that is going on there, in the way of proceedings in the suit, is an utter nullity ; and it is, certainly, not becoming for this Court to stay proceedings which this Court declares to be null and void. It would hesitate long before it would stay void proceedings in a State Court. The State Court, it is to be assumed, regards the proceedings now going on in this Court, in this suit, as null and void ; but it is not to be assumed that the State Court would undertake to restrain the defendants from carrying on such null and void proceedings. It has not done any thing of the kind as yet, and it would, doubtless, regard such a proceeding as outside of its proper province. So far as appears to this Court, the action of the State Court, in this matter, has been entirely unexceptionable, as respects this Court, or any action of this Court. The point upon which Mr. Justice Barnard placed his decision in the State Court, in this case, is one upon which I am clearly of opinion that he was wrong ; but it is a question as to the construction of a statute, on which Judges and Courts often differ in opinion.

Irrespective of the views already presented, if this suit is an existing proceeding in the State Court, this Court is inhibited, by the 5th section of the Act of March 2d, 1793, from granting an injunction to stay such proceeding. The statute uses, indeed, the words, " a writ of injunction ;" but the spirit of it is, that this Court shall not in any manner stay a proceeding in a Court of a State. It is not an inhibition merely against issuing

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an injunction in the shape of a writ of injunction, *mandamus*, or prohibition, directed to the State Court itself, but it has been construed always as an inhibition against staying a party from conducting such proceedings in a State Court. Such was the view of this Court in the case of *The City Bank of New York v. Skelton*, (2 *Blatchf. C. C. R.*, 14, 18,) where this Court was asked to stay a defendant from taking further proceedings in a suit which he had brought in a State Court. This Court says: "There is an impediment to the enforcement of that principle by this Court in the case now before it. One of the suits pending, against which the plaintiffs ask relief, is prosecuted in the State Court of Chancery, and this Court is clothed with no power to restrain or interfere with a suit so situated. A Court of the United States, in executing a jurisdiction vested in it, may undoubtedly act upon parties who are suitors in a State Court in relation to the same subject-matter, so far, at least, as to compel their submission to such judgment as the United States Court may render in a case of which it has cognizance. But, even then, it cannot interdict their prosecuting their suit in a State Court, much less control any action pending in such Court. It is understood that the State Courts uniformly adopt the same doctrine in respect to Courts of the United States." In the order made in that case, this Court declared, that the proceedings in the State Court were not within the cognizance of this Court, or subject to its control, and, therefore, it issued an injunction merely restraining the defendant from further prosecuting suits brought by him in this Court, until the suit in the State Court should be decided.

It results, from these views, that, although this suit has been properly removed to this Court, and is now pending here, it is not a proper exercise of the judicial power of this Court to grant the order asked for. The motion is, therefore, denied.

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PETER BROWN

vs.

GEORGE C. HALL, AND OTHERS. IN EQUITY.

Where a patent for an "improvement in paint-cans" claimed "the employment of a strengthening wire within the bead, as, and for the purpose herein shown and described," and the specification stated the point of the invention to be, placing a wire within a bead near the top edge of the body of the can, close under where the cover, when on, would come to, in order to strengthen the sides of the can, and prevent them from collapsing, by the great weight of the paint, when the can should be held by a bail: *Held*, that if a can, so constructed, was old, as a structure, it was of no consequence what it was designed to contain, provided it employed, within a bead located in substantially the same place, a wire, to strengthen the can against side pressure, and prevent its walls from collapsing by such side pressure.

Held, also, that an ice-cream freezer, if so constructed, was an answer to the patent, on the ground of novelty, although it had no bail by which it could be held up or carried.

An answer, in a suit in equity, on a patent, ought, in order to raise the defence of a want of novelty in the patent, to specify the time, place, and person, when, where, and by whom, the prior invention was made or known, with sufficient particularity to enable the plaintiff to know what he has to meet.

Where the answer does not contain such specification, but only avers general want of novelty, and prior use and sale generally, and the defendant takes testimony before the examiner, to prove such want of novelty, without any objection being at the time interposed by the plaintiff, on the ground that the testimony is directed to a defence not raised by the answer, the plaintiff must be regarded as waiving such objection, and it is too late for him to raise it at the hearing of the cause.

An objection to testimony made on the taking of it before an examiner, must state the ground of the objection, or it is not a legal or valid objection.

In this case, the defendant was allowed to move to amend his answer, without costs, after the hearing, and before the decree, so as to set up the particulars of defence, on the ground of the want of novelty, disclosed in his proofs.

(Before BLATCHFORD, J., Southern District of New York, April 10th, 1869.)

THIS was a final hearing, on pleadings and proofs, of a suit in equity, founded on letters patent issued to the plaintiff, November 29th, 1859, for an "improvement in paint-

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cans." The specification stated, that the invention was "a new and improved can;" and that the body of the can was constructed with a semi-circular projection, or bead, near to its top edge, which served to strengthen the can against any side pressure, and which was at such a distance from the top edge of the body of the can, that the cover, when the same was on, came down close to the upper side of this projection or bead. The specification added: "Within the bead a wire is placed, which gives strength to the sides of the can, preventing them from collapsing. The tin cans usually employed, are liable to collapse when held by a bail, owing to the great weight of the paint; but, by the use of the wire within the bead, the walls of the can are strengthened, so that they cannot collapse. No paint-can thus made, nor any other covered vessel, has ever been made, having a wire secured within a bead near and below the mouth, as shown by me, as far as I am aware." The claim of the patent was as follows: "The employment of a strengthening wire within the bead, as, and for the purpose herein shown and described."

Stephen D. Law, for the plaintiff.

Henry E. Tremain and *James A. Seaman*, for the defendants.

BLATCHFORD, J. The point of the invention in this case, as disclosed by the specification, is, placing a wire within a bead, or semi-circular projection, near the top edge of the body of the can, and at such a distance from such top edge, that the cover, when the same is on, comes down close to the upper side of the bead. The object of the wire in the bead is to strengthen the sides of the can, and prevent them from collapsing by the side pressure of weighty contents. The liability of a can of paint to collapse, when held by a bail, is pointed out; and the cause assigned is, the great weight of the paint. The specification states, that the invention is claimed "as new in the construction of paint-cans," and the

patent is granted for an "improvement in paint-cans." But the specification states, that no covered vessel, so far as the patentee is aware, has ever been made, having a wire secured within a bead, near and below the mouth, as shown by him. If a can, so constructed, be old as a structure, it is of no consequence what substance was, or was intended to be, carried or contained within it, provided it employed, within a bead located substantially in the same place, a wire to strengthen the can against side pressure, and prevent its walls from collapsing by such side pressure.

The evidence of James A. Price, a witness for the defendants, a tinsmith, residing in Brooklyn, New York, fifty years of age, and who has worked in the tin business for thirty-seven years, shows, that, from the year 1835 to the year 1840, at number 111 Greenwich street, in the city of New York, he made vessels for freezing ice cream, the vessel being about thirteen or fourteen inches long, and from five to eight inches in diameter, and having an exterior bead from three-quarters of an inch to an inch and three-quarters from the top, and a wire inside of the bead, to strengthen or stiffen the vessel, the cover going down, on the outside, to the bead. This ice-cream freezer had no bail or handle, by which it could be held up or carried. It had a handle on the top of the cover, by which to revolve it in a freezing composition. The plaintiff's paint-can is described in his specification, and shown in the drawings of his patent, as provided with a handle, by which it can be lifted or carried. From twenty-five to fifty of the ice-cream freezers in question were made. They were publicly sold. The wire was tinned, and then covered with solder in the bead, as nearly as could be, so as to make a smooth interior surface, and prevent the rusting of the wire. It is quite apparent, that, as a structure, having a wire within the bead, to give strength, and prevent the collapsing of the walls of the vessel from side pressure, the patented can and the ice-cream freezer are alike. This is irrespective of any handle or bail. The claim of the patent does not embrace a handle or bail. It claims only the employment of

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a strengthening wire within the bead, for the purpose described. That purpose is to strengthen the can against side pressure, and prevent its walls from collapsing by side pressure. The side pressure, from the contents within the vessel, existed in the ice cream freezer, and the effect of the wire therein was to strengthen the vessel, and prevent its walls from collapsing. Whether the force of the side pressure be exerted by lifting the vessel by a handle, and suffering the weight of its contents to exert the side pressure, or by pressing down on its cover, as would happen when the ice-cream freezer was revolved in the freezing composition, makes no difference. In the paint-can, when lifted, the pressure on its sides would be outward, from within; while, in the ice-cream freezer, when revolved in the freezing composition, which was the way of using it, as stated by Price, the pressure would probably be that of the freezing composition exerted inwardly, from without. But this makes no difference. Whether an amendment of the claim, to introduce the handle or bail as an element in the combination, would distinguish the can from the ice-cream freezer, is a point not necessary or proper now to be determined. The only point I now decide is, that, in claiming the employment of a strengthening wire within the bead, for the purpose described in his patent, the patentee was anticipated by the ice-cream freezer, and that the claim is void for want of novelty.

The plaintiff insists, however, that the defendants cannot avail themselves of this defence, for the reason that the answer only sets up that the invention was not new with the plaintiff, and had, long before the date of his patent, been in public use, and on sale, without the plaintiff's consent or allowance, and that the plaintiff was not the true, original, or first inventor of it, and that the mode of making cans, described in his specification, was, in all substantial respects, well known, and frequently and publicly used, in the manufacture of cans for the holding of paint, and for other purposes. The answer states no place where, or time when, or

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person by whom, the prior invention was made or known. Under the decisions in *O'Reilly v. Morse*, (15 *Howard*, 62, 110,) and *Pitts v. Edmonds*, (2 *Fisher's Patent Cases*, 52, 54,) I think that such substantial matter of defence as that relied on in this case, ought to be set up in the answer, if it is to avail the defendant, with sufficient particularity to enable the plaintiff to know what it is he has to meet. But the ground on which the doctrine of those cases is put is, that the patentee must not be allowed to be surprised, and must have notice of what he is required to meet. In the present case, the objection in question was not taken by the plaintiff, until the hearing before the Court on the proofs. The defendants examined, before the examiner, five witnesses on the question of novelty, including the witness Price, and the plaintiff interposed no objection on the ground that the testimony was directed to defences not raised by the answer. Every objection which could be taken, and which does not appear, by the record of the testimony, to have been specifically taken, must be considered as having been waived. An objection to testimony which does not state the ground of the objection, is not a legal or valid objection. The presumption is, that if the plaintiff had caused it to be stated on the record, by the examiner, that he objected to the evidence on the subject of novelty, because the answer specified no time, place, or person, in respect to the prior invention, the defendants would have taken steps to amend their answer. On these grounds, they will now be allowed to do so, without costs, setting up the particulars of defence, on the ground of want of novelty, disclosed in the proofs. A motion, on notice, must be made, setting out the specific amendments desired. When the answer shall have been thus amended, the bill will be dismissed, with costs.

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THE UNITED STATES

v8.

JOHN W. GEORGE AND OTHERS.

The proper course of practice, where claims are made by the United States, by customs' officers, and by informers, to a fund in Court, paid in under the laws relating to the customs.

There is no statute of the United States which forfeits the value of dutiable goods which have been unlawfully removed from a bonded warehouse, without payment of the customs duties.

Customs' officers and informers are entitled to share only in fines, penalties, and forfeitures which are created by some law of the United States.

The authority to compromise, conferred on the Secretary of the Treasury by the 10th section of the Act of March 3d, 1863, (12 *U. S. Stat. at Large*, 740,) is not an authority to compromise criminal prosecutions.

The authority so conferred, defined and explained.

The Secretary of the Treasury has no power, under any Act of Congress, to compromise criminal proceedings pending in Court.

Duties are not simply a charge upon merchandise, to be collected only by means of the custody of the property, but are a personal debt against the importer, which may be collected by a civil action.

Money in the registry of the Court, which is shown to have been demanded by the United States as duties, to have been due as such, and to have been paid as such, must be distributed by the Court as such.

The rights of customs' officers and informers are rights which should be carefully protected.

In a contest between informers, he is the informer, who, with the intention of having his information acted upon, first gives information of a violation of law, which induces the prosecution, and contributes to the recovery of the fine, penalty, or forfeiture which is eventually recovered.

(Before BENEDICT, J., Southern District of New York, April 16th, 1869.)

THIS was a controversy between the customs' officers and certain informers on the one hand, and the United States on the other, and also between the informers, among themselves, in regard to the distribution of a certain fund, which originally consisted of \$59,722 in gold, and \$32,000 in currency, and which was paid into the registry of this Court

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under the following circumstances : In the summer of 1867, the officers of the customs, having discovered that great frauds upon the Government had been perpetrated by persons doing business in the city of New York, under the name of J. W. George & Co., by means of the withdrawal, without payment of duties, of dutiable merchandise, from their bonded warehouse, Nos. 290 and 291 West street, criminal proceedings were instituted against the offenders, in which several of them were arrested and held to bail for trial, and a civil action for duties, amounting to \$400,000, was commenced in the District Court, against one of them named Henry Hart, in which suit a large amount of real estate and personal property was attached. A quantity of segars, appraised at some \$25,000, was also seized by the collector, as forfeited by reason of these frauds. Pressed by these proceedings, the offenders commenced negotiations with the officers of the Government, which terminated in an agreement, made at Washington, with the Secretary of the Treasury, by which it was arranged that the offenders should pay to the United States the sum of \$59,722 in gold, for the duties on the segars, brandy, rum, gin and wine withdrawn by them without payment of the duty, and also \$32,000 in currency, as penalties for the illegal abstraction of such bonded merchandise ; and that, upon such payment, the Government should discharge all the property which had been attached or seized, and release the offenders from all civil and criminal liabilities relating to the illegal transactions. Accordingly, instructions were issued to the District Attorney to carry into effect this arrangement, and the offenders proceeded to make the payment agreed on. This payment, however, by arrangement with the District Attorney, was not made in the action for duties which was pending in the District Court ; but a new, and, in some sense, a friendly action of debt was commenced in this Court, not for duties, but for penalties and forfeitures, amounting to the sum agreed on, namely, \$59,722 in gold, and \$32,000 in currency, in which action judgment was confessed on the same day, and the same was satisfied, on the

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payment into the registry of this Court of the sums demanded. At the same time, the property attached in the action pending in the District Court was released from custody, and all the criminal proceedings were stopped. The segars held under seizure by the collector were also directed to be released, on due entry and payment of the duties to the collector. There being thus \$59,722 in gold, and \$32,000 in currency, in the registry of this Court, a controversy arose respecting the rights of the customs' officers and the informers in this fund, it being claimed, by the officers and the informers, that no part of it was duties, but that it was all penalties and forfeitures, and, as such, distributable, one-half to the Government, one-fourth to the customs' officers, and one-fourth to the informers. A controversy also arose between the parties claiming to be the informers, in regard to their respective rights. One-half of the gold and one-half of the currency being clearly payable to the United States, was so paid, by consent, and one-half of the residue of the currency, admitted to be payable to the collector, was paid, by consent, thus leaving in the registry \$29,861 in gold, and \$8,000 in currency. To one-half of this \$29,861 in gold the customs' officers laid claim, and the informers claimed the other half, as well as the balance of the currency. These several claims were set forth by petitions, under which, by order of the Court, testimony in behalf of all the parties was taken by the clerk. Upon these petitions, and some 363 pages of testimony, with a mass of exhibits, the case now came before the Court for its determination.

Simon Towle, for the United States.

Clarence A. Seward, *Christopher Fine*, and *Asa W. Tenney*, for the several informers.

BENEDICT, J. The course of procedure adopted in this matter appears to have been somewhat irregular. A more proper practice would have been, for the customs' officers and

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the informers to have set forth their claims to this fund by petitions, to which answers should have been interposed by the Government, and, upon the issues thus framed, and the testimony adduced by the respective parties, in support of their allegations, a decree could have been rendered, with less danger of confusion and mistake. The respective parties petitioning here seem to have treated each petition as an answer to the others; and the customs' officers appear to have considered themselves entitled to prove their case under the petition presented by the United States. But, as all parties have spread out their case very fully in the evidence, and as all the points in controversy have been considered and argued by the counsel, without objection, as if duly pleaded, it appears unnecessary to direct the proceedings to be reformed.

In considering the questions thus presented, it will be convenient to examine, first, the claim made by the customs' officers and the informers to the portion of the fund consisting of \$29,861 in gold. The claim in regard to this is, that the \$59,722 in gold, of which the \$29,861 remaining in the registry is a moiety, consisted of fines and penalties, and that a moiety of it is given by law to the customs' officers and informers; while, on the part of the United States, it is contended that the \$59,722 was not fines and penalties, but duties, in which no person is entitled to share with the Government.

The determination of this issue renders it necessary to consider, at the outset, the effect of the record of the judgment in favor of the United States, and against the offenders, which was entered on the 27th of December, 1867, and was satisfied upon the payment of this fund into the registry. This record, which it has been suggested, on this argument, must be conclusive in favor of the customs' officers and informers, would, as I view it, if held conclusive, deprive those persons of any right to any portion of this fund. This will appear from an examination of the record itself. The cause of action which the record sets forth, and which was admitted by the confession, is, that certain parties defendant unlawfully

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removed from a bonded warehouse dutiable goods, without payment of the duties, whereby, as it is averred, the value of the goods became forfeited to the United States, and the United States became entitled to have of the defendants \$59,722 in gold, and \$32,000 in currency. The record nowhere refers to any statute by virtue of which the alleged forfeiture arose, and no statute has been found which forfeits the value of goods for any such act as is set forth in the declaration, or which, upon the facts stated in the declaration, created a legal liability on the part of the defendants to pay to the United States this \$59,722 in gold, and \$32,000 in currency. Customs' officers and informers can claim to share only in fines, penalties, and forfeitures which are created by some law of the United States. If no statute exists, by virtue of which any particular sum of money, whether called a fine, a penalty, or a forfeiture, has been demanded and paid, no customs' officer or informer can share in the money. Here was no forfeiture of goods, for, no goods subject to forfeiture were proceeded against. The segars which were seized by the collector were released, without any other condition than that they should be duly entered, and the duties be paid; and the illegal acts charged in the declaration did not render the parties liable in a civil action, under any law of the United States, to such fines and penalties as were demanded. It may be that the \$32,000 in currency, which formed part of the demand, can be held to be thirty-two fines of \$1,000 each, incurred by virtue of the Act of August 6th, 1846, (9 *U. S. Stat. at Large*, 53;) and that portion of the fund has been so treated by the Government. But this would not affect the \$59,722 in gold, which is now under consideration. If, then, the record alone were to be looked to as fixing the rights of the parties, it would seem to confer no right upon the customs' officers and informers to a distributive share of the gold in the registry. This difficulty has been realized on this proceeding, and, accordingly, the customs' officers and informers have not rested their claims upon the record of the judgment alone, but have, without objection on the part of the Gov-

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ernment, introduced much testimony to show the real nature of the claims made by the Government against the offenders. The case being thus opened, evidence has been also introduced by the United States, tending to show the circumstances under which this money was demanded and paid. This evidence, therefore, thus introduced by the respective petitioners, and which discloses the actual liabilities which the parties who paid this money were under to the United States, and from which they sought to be discharged by the payment which they made, must be considered in connection with the record, in determining the character of the fund in question; and the rights of the parties to share therein. It is proper to say here, that, if the course of this proceeding had been otherwise, and the judgment entered on the 27th of December, 1867, had been relied upon as decisive of the character of this fund, it would, doubtless, have been incumbent upon the Court—called on, as this Court is by this proceeding, to distribute a fund in its registry—to require a fuller explanation than has yet been given of the circumstances under which that judgment was taken. On this argument, it has been treated by the counsel for the Government as an inadvertence, and, perhaps, properly so treated; but, it is such an inadvertence as to require full explanation before I should feel justified in disposing of this large amount of money in accordance with its terms.

Looking, then, into the evidence as it has been given, it appears, that certain parties, doing business under the name of J. W. George & Co., perpetrated frauds upon the Government, by removing for consumption, dutiable goods from a bonded warehouse, without payment of the duties; that criminal proceedings were commenced against them, and also a civil suit to recover some \$400,000 of duties, in which suit a large amount of property was attached; that, thereupon, the offenders applied to the Secretary of the Treasury for relief, and then, plainly and deliberately, admitted themselves to be liable to the Government for duties amounting to \$59,722 in gold, which they promised to pay, together with the sum of

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\$32,000, as thirty-two penalties for as many unlawful withdrawals, which they also admitted to have been made by them; and that, thereupon, the Secretary agreed that all the parties implicated should be released from all civil and criminal liability relating to the transactions in which they had been engaged, upon the payment of such duties and penalties. In pursuance of this agreement, the parties did pay into the registry of this Court the \$59,722 in gold, and the \$32,000 in currency, in question; and all the pending civil and criminal proceedings, were thereupon stopped by the District Attorney. But the payment, instead of being made in the proceedings, pending at the time of the agreement with the Secretary, was made in satisfaction of a judgment confessed by them in a friendly action, which they suggested should be commenced, as affording them a more satisfactory evidence of the payment of the money which they had agreed with the Secretary to pay.

Upon the evidence, it is claimed, on the part of the Government, that the agreement made by the Secretary was a compromise made by virtue of the 10th section of the Act of March 3d, 1863, (12 *U. S. Stat. at Large*, 740,) and, therefore, decisive of the character of the fund realized in pursuance of it. To this view I do not assent. The authority, conferred by the Act referred to, is an extraordinary power, which the interests of the Secretary of the Treasury, as well as those of the Government, require to be carefully guarded against abuse. The statute, therefore, confines the power to the compromise of claims in favor of the United States, and confers no power at all in regard to criminal prosecutions. It looks, also, to the attorney of the Government, in charge of the claim, as the proper place of origin for arrangements looking to a compromise, and might well be held to confer no power in regard to claims not in suit; and it requires, as the basis, and the only legal basis, of action on the part of the Secretary, a report of the attorney of the Government, showing in detail the condition of the claim, and the terms of compromise proposed, and also showing the approval of the

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terms by the attorney. It also requires, in addition, that the Solicitor of the Treasury shall recommend the acceptance of the terms. The Act thus provides for the creation and preservation of a complete record of all cases of compromise, showing the transaction in detail; and the voluntary assent of three different officials to the terms of any compromise which it is proposed to accept, is required to make it effective. Under the statute, the action of the Secretary is confined to the acceptance or rejection of the terms recommended by the attorney. Here, the terms agreed to by the Secretary were never reported or recommended by the District Attorney, and the action of the Secretary must, therefore, be held to be without sanction of law, and of no effect as a legal compromise.

The present case, in which it is claimed by the Government, that the recommendation, by the District Attorney, of terms requiring a less sum than that finally agreed on with the Secretary, warranted the Secretary, under the statute, in accepting terms deemed more favorable, affords a good illustration of the result of any other than a strict adherence to the provisions of the Act. For, it seems, as I understand the figures, that the terms agreed upon by the Secretary, although apparently less favorable to the offenders than those recommended by the District Attorney, were, in fact, more favorable, and the sum realized was several thousands of dollars less than the parties themselves had offered to the District Attorney.

While considering the action of the Secretary in making this compromise, I feel bound to notice another prominent feature in it, which is, that the Secretary undertook to compromise the criminal proceedings which were pending in Court. Neither the Act of March 3d, 1863, nor any other Act that I know of, confers that power on the Secretary of the Treasury. The Solicitor of the Treasury may, perhaps, have power, in a proper case, and upon his own official responsibility, to instruct a District Attorney to effect a discontinuance of a criminal prosecution, for offences arising under the rev-

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enue laws ; but I know of no statute which permits either the Secretary or the Solicitor to demand money of a person accused of crime, in consideration of causing a criminal prosecution to cease, although the money may be demanded for the United States, as was the case here. Civil suits for penalties and forfeitures may be compromised or remitted by the Secretary, in the manner prescribed by law ; but I apprehend, that neither the power to determine the extent of punishment to be inflicted in a criminal proceeding, nor the pardoning power, has been entrusted to the Secretary or the Solicitor, or the Collector. The action of the Secretary, in regard to the criminal proceedings pending against John W. George, Henry Hart, and others, was, therefore, of no legal or binding effect whatever ; and his action in regard to the civil suits against the same parties was unauthorized, for want of compliance with the conditions which the statute imposes upon his power of remission and of compromise.

But, while the agreement made by the Secretary has no effect, as a legal compromise, to determine the character of the fund in question, the admissions of the parties, made to the Secretary, during the negotiation which ended in the agreement, are competent and very controlling evidence to show the liabilities of the parties to the Government, and the real character of the fund which they subsequently paid in discharge of their liabilities. These admissions, with other uncontradicted evidence in the case, show, that the parties who paid this \$59,722 in gold, were legally liable to the Government, for duties upon segars and liquors, amounting to that sum. This cannot be disputed as to \$34,834.50 of the amount ; for, Henry Hart was the importer of segars on which the duties had been duly ascertained and assessed at that sum, and which he withdrew without payment of any duty. As to the remainder, being duties charged on rum, gin, brandy and wine, although the custom-house officials seem to have had difficulty in tracing the articles, the Secretary had thirty-two orders on the bonded warehouse for certain specified withdrawals of such liquors, which were signed by these same

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parties, which quantities, it is proved, they withdrew without payment of the duties. The appraisers and other officers of the custom-house declare, that neither the records of the custom-house, nor the orders, nor both together, enable any one to say what amount of duties has been lost; but there is evidence tending to show withdrawals of liquors by these parties from this warehouse, without payment of the duties. This evidence, with the admissions of the parties as to the amount, is sufficient to show that this is not a case of simply calling a sum duties, which was, in reality, penalties, as has been contended, but that an actual legal liability to the Government for duties existed, the exact amount of which the parties admitted and promised to pay.

It is said, that there could be no legal liability for duties, because no duties can be "collected, levied, and paid," as duties, unless the merchandise is in the possession and control of the Government; that, as soon as property is fraudulently withdrawn, the power to collect duties ceases, and fines, penalties, and forfeitures are imposed. But the law is otherwise. Duties are not simply a charge upon the merchandise, to be collected only by means of the custody of the property. They are also a personal charge against the importer—a debt created by law, which may be collected by a civil action, wholly irrespective of the possession and custody of the goods. (*United States v. Lyman*, 1 *Mason*, 482.) Here, segars, on which the duty was \$34,834.50, were actually imported by these parties, who were liable, as importers, for such duties, and who discharged that liability by the payment of the fund in question, while the liquors were bought by them in bond, subject to duties, sufficient in amount, as they themselves admitted, to make up the balance of the \$59,722, and which they became liable to pay when they withdrew the merchandise for consumption, as they subsequently did.

Again, it is said that there was no liability for duties, so far as the liquors were concerned, because these goods had been taken out of the bonded warehouse on bonds to deliver them to a manufacturing warehouse, whereby the right to

duties was lost ; and that the only subsisting liability was for damages upon the bonds. But the evidence shows, quite plainly, that the ostensible transfer to the manufacturing warehouse, which was owned by these same parties, was simply a cover for the fraud. The real intention of the parties, when the goods were bought, was to withdraw them and put them upon the market, without payment of duties ; and that intention was successfully carried out, by means of an ostensible transfer to the manufacturing warehouse. The whole was one single connected enterprise, namely, the withdrawal of these dutiable goods for consumption, without payment of the duties.

Furthermore, if this \$59,722 in gold be not duties, what is it ? It is said to be penalties prescribed by the Act of August 6th, 1846. But, the penalties prescribed by that Act are a fine of \$5,000, or imprisonment, in the discretion of the Court, and a penalty of \$1,000 for opening the warehouse, and getting access to the goods, in the absence of the custom-house officer. If the latter penalty was ever incurred by these parties, which is by no means clearly shown, it forms the portion of the fund consisting of the \$32,000 in currency, and is not the gold. Besides, what Act prescribes a penalty in gold ?

But, the fund in Court is said to be a single amount, paid by virtue of the duress of the civil and criminal proceedings, and, therefore, no part of it duties. An exaction, not based on a legal liability, paid to avoid the exposure and punishment likely to follow a criminal prosecution, is what is characteristically termed, in common parlance, "hush-money." If such were the character of this fund, it would not avail the customs' officers and informers, for, they are, by law, entitled to a certain share of lawful fines, penalties, and forfeitures, imposed and collected by virtue of provisions of law. No statute gives them any right to any portion of irregular exactions. But, to suppose the Secretary of the Treasury, or the Solicitor, or the District Attorney, to have consented to such an exaction from offenders like these, is to impute a gross dereliction. No such supposition is necessary, to deter-

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mine the character of this gold, for the evidence sufficiently shows that it was demanded as duties, was due as such, and was so paid. It must, accordingly, be distributed as such.

In dismissing this branch of the case, I may properly add, that the action of the Secretary of the Treasury, in making the agreement which he did with these offenders, and which was severely criticised, on the argument, as an attempt to deprive the customs' officers and the informers of their legal rights, does not appear to me to be capable of such a construction. If such an intention were disclosed by the proofs, it would receive no support at the hands of this Court; for, the right which the law gives to informers and to customs' officers, in order to insure a better enforcement of the revenue laws, are rights which are entitled to be carefully protected, both by officials and Courts. I discover no such intention, in the action of the Secretary, but only an effort to obtain for the Government as great a portion of the duties legally due to it as was possible by the method adopted. Whether a vigorous prosecution of the civil action for the \$400,000 of duties supposed to have been lost, and a proper criminal punishment of the offenders for their crimes, together with an enforcement of the forfeitures incurred, would not have been a method more likely to secure obedience to the law in future, is, perhaps, open to question. It may be that such a course would have realized, in addition to these duties, a larger amount of penalties and forfeitures than the \$32,000 which was paid. But the abandonment by the officers of the Government of the prosecutions for penalties and forfeitures, although it may have been irregular or injudicious, can have no effect to change the character of a payment of duties, which is shown to have been made in discharge of a subsisting liability for such duties. My conclusion, upon this branch of the case, is, therefore, that the customs' officers and the informers have failed to show themselves entitled to a distributive share of the \$29,861 in gold, now in the registry.

It remains only to determine who are the informers en-

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titled to the \$8,000 in currency, which has been substantially conceded to be penalties distributable to the informers, the other one-quarter of the \$32,000 in currency having been paid over to the collector, as penalties in which he was entitled to share. The persons claiming to be the informers are J. W. Wiggin, D. H. Burtnett, and J. W. Hefflin, on the one hand, who claim one-quarter of the whole amount of penalties; and E. D. Webster, Rodman G. Moulton, and John S. Beecher, on the other. The latter persons do not present, for the decision of the Court, any issue between themselves, but have consented that whatever may be found payable to any of them shall be paid to the attorney who represents them all. They do, however, dispute the right of Wiggin, Burtnett, and Hefflin, to any share as informers. I have examined with care the voluminous evidence bearing upon this question, and, while I am satisfied that Wiggin procured valuable evidence, and Burtnett and Hefflin evidence still more important, tending to make out a strong case against the offenders, without which, indeed, it is doubtful whether any considerable sum would have been recovered from them, and, although it seems to me not consistent with justice that Burtnett, who spent much time, and expended some money, in ferreting out the details of the fraud, and in finding the property, which was attached as the property of Henry Hart, should receive no reward, still I am unable to adjudge either Wiggin or Burtnett or Hefflin to be legally entitled to share in this fund, as informer. Their action cannot be said to have induced the prosecutions which were instituted. The fraud was discovered by others, proceedings were commenced in pursuance of that information, and the clue to the parties was obtained before either Wiggin or Burtnett or Hefflin gave any information. What they did was to furnish evidence tending strongly to confirm the truth of the statements of the informers. The informer is he who, with the intention of having his information acted upon, first gives information of a violation of law, which induces the prosecution, and

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contributes to the recovery of the fine, penalty, or forfeiture, which is eventually recovered. (*Sawyer v. Steele*, 3 Wash. C. C. R., 464, 469; *City Bank v. Bangs*, 2 Edw. Ch. R., 95, 105; *Lancaster v. Walsh*, 4 Mee. & W., 16.) In the present case, information had been given of the frauds, upon which positive and effective action was taken, and which contributed to the recovery of the \$32,000, a considerable period before either Wiggin or Burtnett or Hefflin gave any information at all; and such first informers, who were Webster, Moulton, and Beecher, are the legal informers, entitled to the informer's share of this fund.

In accordance with these views, a decree must be entered adjudging that E. D. Webster, Rodman G. Moulton, and John S. Beecher, are entitled, as informers, to the \$8,000 in currency, in the registry, and that the United States are entitled to the \$29,861 in gold.

JAMES DALLET vs. HENRY A. SMYTHE.

"Angostura bitters," an article which, although of some value, as a remedy for some affections of the human body, is principally used in bar-rooms, as a flavoring extract for mixed drinks, is liable to a duty of 100 *per cent.*, under § 2 of the Act of June 30th, 1864, (13 U. S. Stat. at Large, 202,) as "spirituous liquors, not otherwise enumerated," and not to a duty of 50 *per cent.*, under § 5 of the Act of July 14th, 1862, (12 *Id.*, 546,) as a medicinal preparation.

(Before BENEDICT, J., Southern District of New York, April 17th, 1869.)

THIS was an action against the Collector of the port of New York, to recover back certain duties alleged to have been illegally exacted. It was tried before the Court, without a jury, upon an agreed statement of facts and oral evidence. The facts were as follows: The plaintiff imported an article known as Angostura bitters, put up in black glass bottles, each containing less than a quart. The plaintiff, upon entry of the goods, reported them as aromatic or Angostura bitters, and claimed that they were subject to a

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duty of 50 *per cent.*, *ad valorem*, under section 5 of the Act of July 14th, 1862, (12 *U. S. Stat. at Large*, 546) which provides for that rate of duty on "all pills, powders, tinctures, troches, or lozenges, syrups, cordials, bitters, * * * or other medicinal preparations, or compositions, recommended to the public as proprietary medicines, or prepared according to some private formula or secret art, as remedies or specifics for any disease or diseases or affections whatever, affecting the human or animal body." The appraisers, however, classified the article as "spirituous liquors, not otherwise enumerated," within section 2 of the Act of June 30th, 1864, (13 *U. S. Stat. at Large*, 202,) which imposes a duty of 100 *per cent.* thereon. This rate of duty the plaintiff paid, under protest, claiming that the goods were liable to only 50 *per cent.* duty, because the chief component was not distilled spirits, and also because the article was a medicinal preparation, prepared by a secret method. An appeal was taken, and the decision of the defendant was sustained. Thereupon this action was brought. The amount of the excessive duties, according to the claim of the plaintiff, was admitted to be \$3,728; and it was also stipulated, that, unless the goods were to be classified as a medicinal preparation, prepared according to a private formula or secret art, as a remedy or specific for diseases or affections affecting the human body, the judgment should be for the defendant.

George St. George, for the plaintiff.

Simon Towle, for the defendant.

BENEDICT, J. The article here in question, known as "Angostura bitters," cannot, in my opinion, be properly classified as a medicinal preparation, under the 5th section of the Act of 1862. It is true, that it has been proved to be of some value as a remedy for some affections of the human body, such as diarrhoea, but it cannot be said to be prepared as a remedy or specific for disease, within the meaning of that Act. Its principal and characteristic use has been shown to

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be in bar-rooms, as a flavoring extract for mixed drinks. That is the purpose for which it is prepared and sold. It is not ordinarily sold by druggists, or prescribed by physicians as a remedy, but is imported mostly by liquor dealers, and sold by them and by grocers. The fact that it has some medicinal properties, is not sufficient to entitle it to be considered as a medicinal preparation, but its common, well-known, and principal mode of use, for which it is prepared and sold, must control its designation.

The judgment will, accordingly, be for the defendant.

THE UNITED STATES *vs.* FREDERIC CHASSELL.

An assistant assessor of internal revenue, who, of his own motion, and by his own diligence, while in the discharge of his official duty as such assistant assessor, acquires information of facts on which to base a proceeding by indictment for a violation of the internal revenue law, and imparts such information to the district attorney, with the intent that such proceeding shall be instituted upon such information, is, if such information is the first information so imparted, and if it leads to the indictment and conviction of the offender, entitled to share, as informer, in a fund in Court arising from a fine imposed by the Court, and paid on such conviction.

(Before BENEDICT, J., Eastern District of New York, May 26th, 1869.)

THIS case came before the Court upon a motion for the distribution of a fund in the registry, arising from a fine imposed upon the defendant. The proceeding against the defendant was an indictment found against him for carrying on the business of a retail liquor dealer, without having paid the special tax required by law. Upon that indictment he was tried and convicted, and a fine was imposed by the Court, which was paid, and constituted the fund in question. One-half of this fund was now claimed by Brewster Wood, as informer. In support of his claim, Wood produced a certificate of the district attorney, to the effect that he was the person who first informed of the cause, matter, and thing, whereby the arrest and

conviction of the defendant were procured. To this he added his own oath, showing that he first informed the district attorney of the facts upon which the prosecution was based, and also that he had no knowledge or information that any claim was made by any other person to have first informed of such matter and thing. On the part of the Government, there was produced the written admission of Wood, that he obtained the information which he imparted to the district attorney, while in the discharge of his official duty as assistant assessor of the third collection district of the State of New York.

BENEDICT, J. On the facts in this case, a single question is raised, namely, whether the circumstance that Wood obtained the information, on the communication of which he bases his claim as informer, while in the discharge of his official duty as assistant assessor, debars him from claiming a share of the fine, as informer. My opinion is, that it does not, and for the following reasons: It was long since held, that an inspector of the customs might become entitled to receive an informer's share, by reason of information given by him to the collector of customs, and was not debarred from that right by the fact that he was employed by the Government in the enforcement of the revenue laws, under a salary. (*Hooper v. Fifty-one Casks of Brandy, Davis' R.*, 370.) This decision was acquiesced in, and has since controlled the distribution of forfeitures under the customs' laws.

If the early provisions of the internal revenue laws be examined, they show clearly an intention on the part of Congress to continue this feature of the customs' laws in the laws relating to the internal revenue. Thus, the Act of July 1st, 1862, in the 31st section, (12 *U. S. Stat. at Large*, 444,) makes it the duty of a collector of internal revenue to prosecute for the recovery of any sums forfeited by the Act, and declares that all fines, penalties, and forfeitures shall be sued for in the name of the United States or of the collector, and that one moiety of the recovery shall be to the use of the person who, *if a collector or deputy collector*, shall first inform

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of the cause, matter, or thing, whereby such fine, penalty or forfeiture was incurred. This provision was re-enacted in the 37th section of the Act of March 3d, 1863, (*Id.*, 730,) and substantially the same provision appears in the 179th section of the Act of June 30th, 1864, (13 *Id.*, 305.) By the Act of March 3d, 1865, (*Id.*, 483,) section 179 of the Act of 1864 is amended by striking out the words, "if a collector or deputy collector;" and the note to an edition of this Act, which was then published and distributed by the Government, declares that thereafter a moiety of all fines, penalties, and forfeitures is to be paid to the informer, "whether officer of the revenue or a private citizen." These enactments indicate an unmistakable intention to permit officers of the revenue to participate, as informers, in the distribution of fines, penalties, and forfeitures. The various subsequent Acts disclose no change of intention, but have always left this right open to be claimed by any person; and they have been passed with full knowledge that revenue officers were constantly being paid large rewards as informers, and in the face of Treasury regulations which clearly recognize their right to claim such rewards. There is no reasonable doubt, therefore, that Congress intended, by the present Act—what seems to be said by the Act—that any person whosoever may share in a fine, penalty, or forfeiture, provided it be made to appear that such person first informed of the cause, matter, or thing, whereby such fine, penalty, or forfeiture shall have been incurred.

The intention to include officers of the revenue in the general words used by the Act, and to enable them to participate in the distribution of fines, penalties, and forfeitures, is reasonable; for, this mode of stimulating the zeal of officials, by the hope of additional compensation, is a common practice in revenue laws, and the small fixed compensation which is attached to many offices tends to confirm the supposition that it was expected that such compensation would be increased by the rewards of diligence.

As there exist, in the Act, no words of limitation in regard

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to the persons who may become informers, so, also, there is no limitation in regard to the method by which the information shall have been acquired. Any person may become entitled to share as an informer, by reason of any information which contributes in a substantial way to recover the fine, penalty or forfeiture which is finally imposed, provided such information has not only been acquired, but also properly imparted. To whom imparted, the Act does not say; but its fair import is, that the information must be imparted to some one authorized to, and who does thereupon, take official action to recover the fine or penalty, or to enforce the forfeiture, which the information discloses to have been incurred: and the information must be imparted with the intention of having it so acted upon. It must, also, be the first information so imparted. These restrictions can be fairly gathered from the words of the Act, and I am unable to see that any other limitations can be reasonably inferred from any thing contained in the Act.

According to this construction of the law, it clearly appears, that the present petitioner is entitled to a distributive share in the fine in question; for, it appears, that, of his own motion, and by his own diligence, he acquired information, which, being acted on by the proper officer, led to the conviction of the offender. This information he imparted to the district attorney, who, and who alone, was authorized to institute the proceedings which resulted in the imposition of the fine, and he so imparted his information with the intent that such proceedings should be instituted upon his information, and his was the first information so imparted. These facts, unattended with any countervailing circumstances, entitle him, according to my view of the law, to be adjudged to be the legal informer, entitled to a distributive share of the fund in Court.

In thus disposing of the case, I have not omitted to notice two recent cases arising under this same provision of law. *The United States v. 100 Barrels of Distilled Spirits*, (8 Internal Rev. Rec., 20,) and *The United States v. 4 Cutting*

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Machines, (9 *Id.*, 145.) But I find nothing in the actual adjudications of those cases, upon the facts of those cases, as I understand them, which leads me to a different conclusion from that at which I have arrived in this case.

ELIHU SPERRY AND ANNA SPERRY

v8.

THE ERIE RAILWAY COMPANY. IN EQUITY.

An objection that a bill in equity was filed under an agreement made between the plaintiffs and certain other parties, which is void for champerty, ought to be raised formally, by answer, and not by a motion to take the bill from the files.

(Before BLATCHFORD, J., Southern District of New York, May 31st, 1869.)

THIS was a motion by the defendants to take the bill of complaint in this suit from the files of the Court, and to set aside the service of the subpoena therein, on the ground that the bill and the subpoena were an abuse of the process of the Court, and a fraud thereon, and that the suit partook of the nature of maintenance.

William W. McFarland, for the plaintiffs.

Clarence A. Seward, for the defendants.

BLATCHFORD, J. The ground of this motion is, that the bill was filed under an agreement made between the plaintiffs and certain other parties, which is void for champerty. I do not think this is the proper mode of taking the objection. It ought to be raised formally, by answer, so that plenary proofs may be taken in regard to such an issue, and the right of review in regard to it be secured to both parties. If the motion were to be granted, the plaintiffs would be without remedy. The motion is denied.

Franklin v. Heiser.

BENJAMIN FRANKLIN

vs.

HENRY A. HEISER, JR., AND OTHERS.

Where H. made a written agreement with F., that, in case F. could recover certain bonds fraudulently obtained from H., he would pay \$3,000, and the police notified H. that the bonds had been recovered, and were subject to his order, and they did not pass through the hands of F.: *Held*, in a suit brought by F., against H., to recover the \$3,000, that it was incumbent on F., in order to show that he recovered the bonds, within the meaning of the agreement, to show that the police recovered the bonds through information furnished by F., and that it was not enough for F. to show that he sent communications on the subject to the police before the bonds were recovered, it appearing that the police had received other communications on the subject, as well as one from H., before the bonds were recovered.

(Before BLATCHFORD, J., Southern District of New York, June 2d, 1869.)

THIS was an action of *assumpsit*, tried before the Court without a jury. The plaintiff was a detective police officer in Philadelphia. The defendants composed the firm of Henry A. Heiser's Sons, of New York. The declaration averred, that \$15,000 worth of United States five-twenty bonds had, prior to the 24th of November, 1868, been feloniously abstracted from the possession of the defendants; that, on that day, the defendants agreed with the plaintiff, in consideration that he should undertake to recover the bonds, that they would, in the event of the recovery of the same by the plaintiff, pay to him the sum of \$3,000, and that, in the event of the recovery by him of a less amount than the whole of the bonds, they would pay him in the proportion that the amount recovered should bear to the whole sum of \$15,000; and that he did recover all of the bonds for the defendants. The contract between the parties was in writing, as follows: "Philadelphia, Nov. 24, '68. We hereby agree, that, in case B. Franklin, Esq., or assigns, can recover fifteen thousand of 5/20 U. S. 6 ⁰/₁₀₀ bonds, fraudulently obtained from us by J. A.

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Marsh, we will pay three thousand dollars, and that, in case he returns any amount of the above described bonds, we will pay in the same proportion. Henry A. Heiser's Sons."

The bonds were recovered, all of them, at Memphis, Tennessee, where Marsh was arrested. The defendants obtained all of them, but none of them passed into, or out of, the hands of the plaintiff. One of the defendants went to Memphis, from New York, after the arrest of Marsh, and obtained the bonds, after four days' efforts there, from parties who had them in possession, and by the payment of \$4,000. The plaintiff was not at Memphis. He started to go there, and had reached Paris, Tennessee, when he learned that Marsh had been arrested at Memphis, and had been taken to New York by officers from Memphis, and that he, Franklin, had passed them on the way. He retraced his steps, and overtook them in Indiana, and accompanied Marsh to New York, reaching there two days after the defendant who obtained the bonds had reached Memphis. That defendant had left New York for Memphis three days before he reached Memphis, having learned, by a telegraphic despatch to the defendants, from the police of Memphis, that Marsh had been arrested, and that the bonds had been recovered, and were subject to the order of the defendants, less reward and expenses. This despatch reached the defendants, at New York, on the same day that the plaintiff learned, at Paris, of the arrest of Marsh. On the 23d of November, the day before the agreement was made with the plaintiff, the defendants authorized the New York police to offer a reward of \$5,000 for the recovery of the bonds. A telegraphic despatch from the police of New York, to the police of Memphis, giving Marsh's name, and age, and a description of his person, and stating the amount and character of the bonds he had abstracted, and the reward, reached the police in Memphis on the 24th of November, before the agreement with the plaintiff was made. The defendants themselves, on the 25th of November, at half-past 11 o'clock A. M., sent from New York, to the police at Memphis, a telegraphic despatch, as

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follows: "Marsh left Philadelphia, by evening train, on 23d. He started for house of J. Ferguson, his uncle, in your city. Arrest him, and hold him till arrival of B. Franklin, Philadelphia detective, who leaves to-day." The plaintiff made no communication to the police of Memphis until 7 o'clock P. M., on the 25th of November, when he sent a telegraphic despatch to them from Philadelphia. He left Philadelphia, for Memphis, at 11 o'clock P. M., the same day. In addition to the written agreement, the defendants furnished the plaintiff with \$500, to defray the expenses of himself and of Marsh's brother, who was to accompany him, to Memphis. This sum, or so much as should not be expended, the plaintiff was to retain in any event.

Charles M. Da Costa, for the plaintiff.

John E. Burrill, for the defendants.

BLATCHFORD, J. On the facts in this case, I think it is incumbent on the plaintiff, in order to show that he recovered the bonds, within the meaning of the written agreement, to show that the police of Memphis, who notified the defendants that the bonds had been recovered and were at Memphis, subject to their order, less reward and expenses, recovered them through information furnished by the plaintiff. It was easy, if the fact was so, for him to have done this, by producing the testimony to that effect of the police officers of Memphis, who arrested Marsh and obtained the bonds. No explanation is furnished on that subject by the plaintiff, except merely to show that he sent the despatch of November 25th, from Philadelphia, and several despatches afterward from various places on his way to Memphis, which gave a description of Marsh, and particulars as to when he left Philadelphia and Cincinnati for Memphis, and as to the number of his ticket, and which were received by the police of Memphis before Marsh's arrest. The case would be different in the absence of the despatch from the police of New York, of November 24th, and of the one from the defendants of November 25th. The action, therefore, so far as it is founded on the special contract, fails.

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There are in the declaration counts for work and labor, &c., being the common counts. But, on the evidence, the plaintiff was to be entitled to nothing but the \$500 he received, unless he should recover the bonds or some of them. Therefore, he can recover nothing in this suit, on a *quantum meruit*, for the services he rendered.

I find for the defendants.

SAMUEL H. DOUGHTY

vs.

JOSEPH I. WEST, AND OTHERS. IN EQUITY.

James Draper was the original and first inventor of the improvement claimed in letters patent, reissued to Samuel H. Doughty, August 1st, 1865, for an "improvement in skeleton skirts," the original patent having been granted to Doughty and Draper, on the invention of Draper, October 4th, 1859, and reissued to Doughty, and Draper, and James Brown, and William King, December 27th, 1859.

Draper made such invention before he applied for the original patent.

In a suit for the infringement of a patent, the defence cannot be taken, that the patent was issued unintentionally through a blunder of a subordinate in the Patent Office.

It is an infringement of the said reissued patent of 1865, to make and sell skeleton skirts, with the threads of filling left out in one or both of the two portions of tape which form the loop.

Skeleton skirts made in accordance with letters patent granted to Charles H. De Forest, January 6th, 1863, for an "improvement in hooped skirts," are an infringement on the said reissued patent of 1865.

(Before BLATCHFORD, J., Southern District of New York, June 4th, 1869.)

THIS was a final hearing, on pleadings and proofs.

George Gifford and *Stephen D. Law*, for the plaintiff.

John B. Staples, for the defendants.

BLATCHFORD, J. The bill in this case is founded on re-issued letters patent, granted to the plaintiff on the 1st of

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August, 1865, for 14 years from the 4th of October, 1859, for an "improvement in skeleton skirts." The patent was originally issued, October 4th, 1859, to the plaintiff and James Draper, as assignees of said Draper, as inventor. On the 27th of December, 1859, it was reissued to the plaintiff, and said Draper, and James Brown and William King, the then owners of it. Subsequently, and before the granting of the reissue of 1865, the entire interest in the patent, and in the reissue of 1859, was assigned to the plaintiff. He brought a suit in equity on the reissue of 1859, in this Court, against two of the defendants who are defendants in this suit. That suit was brought to a final hearing before Mr. Justice Nelson and Judge Shipman. It appears, from the opinion of the Court in that case, (*Doughty v. West*, 2 *Fisher's Patent Cases*, 553,) delivered by Judge Shipman, and concurred in by Mr. Justice Nelson, that the plaintiff contended that the reissue of 1859 covered all skeleton skirts, with the perpendicular tapes woven singly between the hoops, and woven double, or with pockets, for the reception of the hoops. The Court held, however, that the claim of the reissue of 1859, as drawn, was limited to a skeleton skirt in which the hoops were fastened in the loops or pockets by some kind of material put on in a soft state, and adhering by sticking, and which subsequently became hard, such material being put into the pocket, or upon the hoop within the pocket, so as, when hardened, to keep the hoop rigidly in place. In other words, the Court regarded the reissue of 1859 as covering only the mode of fastening the hoops in the loops in the perpendicular tapes by such adhesive material. The Court then added: "If the invention is broad enough to include all skeleton skirts with the perpendicular tapes woven singly between the hoops, and woven double, or with pockets, for the reception of the hoops, then his patent should be reissued to cover that invention; and there is no possible difficulty about doing it. If there is something in the state of the art which will show that he is not the inventor to that extent, then he can obtain no such reissue. If he is the inventor of a skeleton skirt of

that character, with the perpendicular tapes woven singly between the hoops, and woven double, or with pockets, for the reception of the hoops, which hoops are inserted either while in process of being woven, or after they are woven, and then fastened in any manner, there certainly can be no possible difficulty in describing, and it is the duty of the patentee to accurately describe it." Again, the Court says: "If the patentee invented and was the first to make a skeleton skirt, woven singly between the hoops, and double at the place of insertion of the hoops, fastened at the pockets—and that is the simple description of the invention claimed—then he was entitled to it." Again: "It not very unfrequently happens, that patentees, by mistake, limit the invention described, and make it narrower than the invention made. If that is the case, and it can be seen, on the reissue of the patent, that the invention extends beyond the construction the Court gives it, it can be made the subject of trial hereafter. If the patentee has made the invention thus broadly claimed, it will hereafter present a simple issue for trial, as the patent can be made to cover it without difficulty." This decision was rendered in June, 1865, and the present reissue was granted on the 1st of August, 1865.

The specification of this reissue limits the invention to an improvement in skeleton skirts, that is, as it defines them, skirts consisting of a series of tapes extending from the waist down, and a series of horizontal and parallel hoops secured to the side of the tapes, by stitching, by tying, or by rivet-clasps. The object of the invention is stated to be to remedy the defect which arose from the fact that the fastening by which the hoops were secured to the side of the tapes was liable to break, and permit the hoops to fall and drag on the ground, being a source of inconvenience and often of serious accidents. The remedy is effected, says the specification, "by making the skirt of a series of tapes woven along their length, alternately, as single and as double tapes, to form loops or openings, at the required distances apart, for the reception of the hoops, which are no longer dependent upon the means of fastening to the

side of the tapes, and cannot fall, even if not fastened." It also says: "A skeleton skirt, when thus fabricated, needs no fastening of the hoops to the tapes to hold them up, and the only fastening required is to prevent the tapes from sliding laterally on the hoops, so that, if such fastening should give way, the hoops will still be held up by the tapes." The specification then states, that the inventor has found glue to be a suitable means for securing the hoops in the loops of the tapes, to prevent the tapes from sliding laterally on the hoops, as the weight of the hoops has no tendency to rupture the fastening, as in skeleton skirts known prior to his invention; and that the hoops may be inserted in the act of weaving the tapes, or the tapes may be woven with the loops, and the hoops be inserted afterwards. The specification then describes the manner in which the tapes can be woven as single tapes for the required distance between two hoops, and then be woven double for a little more than the width of a hoop, and then a hoop be inserted between the two series of tapes, and then the weaving of the tapes as single be resumed, and the hoop be thus inclosed in the loops so formed. It further states, that the loops may be formed by the weaving of the tapes in the same manner, and the hoops may be inserted afterward. The claim is as follows: "The new manufacture of skeleton skirt, substantially such as described, consisting of a series of tapes woven, in the direction of their length, in alternate sections, as single and double tapes, with the hoops inserted in the loops formed by weaving the tapes as double tapes, and there secured, to prevent the tapes from sliding laterally on the hoops."

The bill charges, as an infringement of the patent, the making and selling of skeleton skirts by the defendants. One of the principal defences set up to the bill is, that Draper was not the original and first inventor of what is covered by the last reissue, and much testimony has been introduced by the defendants for the purpose of establishing the existence, before the time of the invention of Draper, of skeleton skirts similarly constructed. The main questions discussed on the hear-

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ing were, whether Draper was an original, and, if so, the first inventor of the improvement claimed in the last reissue, and whether he made such invention before the time when he applied for his original patent. On these points the plaintiff has clearly made out his case, to my entire satisfaction. Without discussing the evidence at length, it is sufficient to say, that it establishes that Draper made the invention of a skirt such as is claimed in the present reissue, as early as June, 1856; that neither the Morrow skirt nor the Hartley skirt anticipates the invention; that neither the Hough skirt, nor the skirt defendants' exhibit No. 17, was a skeleton skirt, within the meaning of the patent; that the Clark skirt was not prior to the Draper skirt; that the France skirt was subsequent to Draper's; that the Cornet, the Schmidt, and the Schlumpf skirts were not prior to Draper's; and that no other alleged prior skirt, in regard to which evidence was adduced, is an answer to the patent. In fact, the evidence shows that all the skeleton skirts that have been constructed like the one described and claimed in the present reissue of the Draper patent, are traceable back to the skirts which Draper made in connection with Brown, and put into the market in pursuance of his invention. Such skirts, when Draper and Brown first made them, and put them into the market, were constructed precisely according to the description contained in the specification of the present reissue, and like the first skirt made by Draper in June, 1856, and such they have continued to be ever since.

The present reissue is not attacked or impeached for fraud. It must, therefore, stand as a valid reissue, properly granted. The point taken, that it was issued unintentionally, through a blunder of a subordinate in the Patent Office, is one which cannot be availed of in a suit brought on the patent. For any such alleged invalidity, the only remedy would be a direct proceeding by the United States to vacate the patent. The seal of the United States, and the signatures of the proper officers to the grant must be respected, in the absence of fraud, so long as the United States themselves do not ques-

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tion the grant. This is familiar law in regard to all grants by a sovereign.

The only defence set up on the point of infringement is, that, in some, at least, of the skirts made by the defendants, threads of filling have been left out in one or both of the two portions of tape which form the loop. But this is no defence. The tape is none the less a double tape, within the meaning of the specification, because the loop or pocket is formed wholly of warp threads; and the loop is none the less a loop formed by weaving the tape first as a single tape, and then as a double tape, and then as a single tape, because the portions which form the loop are composed wholly of warp threads. Any such arrangement is, at best, an improvement embodying the original invention of Draper, which cannot be used without violating his patent.

The defendants set up, in their answer, that all the skirts which they have made with double-woven tape, since the present reissue to the plaintiff was granted, have been made under a patent granted to one Charles H. DeForest, January 6th, 1863, for an "improvement in hooped skirts." The specification of that patent declares the invention of DeForest to be an "improved method of fastening the hoops to the tapes in hoop skirts." It also says: "My invention relates to that kind of hoop skirts in which the tapes, or vertical strips, are woven, or formed, with pockets or loops, through which the hoops pass, and which sustain or support the hoops, and my invention has for its object a simple, durable, and effective means of retaining or holding the hoops in the pockets, in their proper position, or, in other words, to prevent the tapes from sliding on the hoops, and, to this end, my invention consists in the employment, in combination with the hoops and pocket tapes, of a metallic retaining clasp, so arranged as to prevent the hoop from sliding through or in the pocket." The claim of the patent is to the employment of the clasp in combination with the hoops and pockets. There is nothing in this patent, properly construed, which can give a right to use, under it, the hoops and pockets, if they are covered by a

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valid prior patent. The plaintiff's patent is a valid prior patent for the hoops and pockets, as an element of DeForest's combination. If DeForest's patent is a valid patent for such combination, the plaintiff cannot use such combination, without obtaining a right to do so under the DeForest patent. Nor can DeForest, or those holding under him, use the invention of Draper, as an element in DeForest's combination, without obtaining a right to do so under the plaintiff's present reissue.

There must be a decree for the plaintiff for a perpetual injunction, and an account, with a reference to a Master, and for the costs of the suit.

MARTHA M. JONES, ADMINISTRATRIX, &C., OF SAMUEL T.
JONES, DECEASED

vs.

FRANKLIN OSGOOD AND OTHERS. IN EQUITY.

The specification of the letters patent granted to Samuel T. Jones, February 24th, 1852, for an "improvement in the manufacture of zinc white," includes in its claim what is found in the English letters patent, No. 11,964, granted November 16th, 1847, specification sealed and enrolled May 16th, 1848, to William Edward Newton, for "improvements in the mode or modes of manufacturing or preparing certain matters to be employed as pigments."

Although the Jones patent was extended by the Commissioner of Patents, on the 23d of February, 1866, and the question of its extension was vigorously contested before the Patent Office, yet, as the existence of the Newton patent was not then adverted to, and there never had been any trial, at law or in equity, on the Jones patent, in which the full bearing of the Newton patent on the invention of Jones had been thoroughly examined, this Court refused to grant a provisional injunction restraining the infringement of the Jones patent.

The specification of the Jones patent does not properly distinguish, within the meaning of the 6th section of the Act of July 4th, 1836, (*5 U. S. Stat. at Large*, 119,) what was invented by Jones from what is found in the Newton patent.

The defendants being three individuals, and the infringement committed by them

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having arisen solely out of their connection with a New Jersey corporation, and only one, O., of the three defendants being interested in the management of the corporation, at the time the motion for a provisional injunction was made, and no infringement having been committed out of New Jersey, where the manufactory of the corporation was situated, and O.'s only concern with the infringement being as a director of the corporation, and he being only one of several directors, and it not appearing that he could control the use, or direct the disuse, by the corporation, of the infringing apparatus, the motion was denied.

Whether, even if a majority of the directors of the corporation were parties defendant to the suit, the suit ought not to have been brought in New Jersey, where the corporation was located, and carried on its business, *quere*.

(Before BLATCHFORD, J., Southern District of New York, June 4th, 1869.)

THIS was a motion for a provisional injunction, founded on letters patent granted to Samuel T. Jones, February 24th, 1852, for an "improvement in the manufacture of zinc white," and which purported to have been extended by the Commissioner of Patents, on the 23d of February, 1866, for seven years from the 24th of February, 1866, and which were, by an Act of Congress, approved July 3d, 1868, (15 *U. S. Stat. at Large*, *Private Acts*, 25,) declared to have been, by virtue of the certificate of extension thereon indorsed, duly extended for the period of seven years from the 23d of July, 1864, that date being the date of the expiration of a patent granted to the inventor, by the Government of Great Britain, for the same invention.

Edwin W. Stoughton, George Gifford, Charles M. Keller, and Clarence A. Seward, for the plaintiff.

Benjamin R. Curtis, Edwards Pierrepont, Thomas C. T. Buckley, and Andrew J. Todd, for the defendants.

BLATCHFORD, J. Various interesting questions were discussed on this motion, but, in the view I take of the case, it is unnecessary to refer to many of them, as there is one ground that is fatal to the motion. The specification of the patent is, I think, so broad as to include what is found in the prior patent, granted in England, November 16th, 1847, No.

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11,964, and the specification of which was sealed and enrolled May 16th, 1848, to William Edward Newton, for "improvements in the mode or modes of manufacturing or preparing certain matters to be employed as pigments." The question of the extension of the Jones patent was vigorously contested before the Patent Office, but the existence of the Newton patent does not seem to have been adverted to. There never has been any trial, at law or in equity, on the Jones patent, in which the full bearing of what is found in the Newton patent on the invention of Jones has been thoroughly examined. The question, as between those two patents, is now presented to me in the unsatisfactory form of *ex parte* affidavits, on both sides, without the benefit of a sifting of the testimony by cross-examination. From the most careful examination which I have been able to give to those affidavits, in connection with the specification of the Jones patent, I cannot resist the conclusion, that that specification, as now drawn, covers, in its claim, things which are found in the Newton patent. The specification is, also, open to the kindred objection, that it does not properly distinguish, within the meaning of the 6th section of the Act of July 4th, 1836, (5 *U. S. Stat. at Large*, 119,) what was invented by Jones from what is found in the Newton patent. I by no means intend to say that there is not, in what Jones really invented, something which may lawfully be patented, by a properly drawn specification, even in view of what is found in the Newton patent.

Independently of the foregoing views, I should hesitate long before granting a provisional injunction in this case. It is shown that whatever infringement has been or is being committed by any of the three defendants on the plaintiff's patent, has arisen solely out of their connection with a New Jersey corporation, called the Bartlett Zinc Company, of which the defendant Osgood is president and a director, and of which the defendants Bartlett and Reid are not directors, although Bartlett has heretofore, and, perhaps, since the commencement of this suit, been a director of it, and Reid was a director of it prior to the commencement of this suit, and is

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now secretary of it. The defendant Osgood is shown to be the only one of the defendants who is now connected with, or interested in, the management of the corporation. No infringement has been committed out of the State of New Jersey, where the manufactory of the corporation is situated. The patent is for the use of a certain apparatus in the collection of the products of the distillation or oxygenation of zinc and other volatile metals. It does not cover the use or sale of such products, when collected. Osgood's only concern with the infringement is as a director of the corporation, and he is only one of several directors. It does not appear that he can control the use, or direct the disuse, of the apparatus by the corporation. The intendment would be to the contrary, as he is but one of several directors. It cannot fairly be said that the apparatus used by the corporation, in New Jersey, is used under the direction, management, and superintendence of Osgood, within the meaning of the case of *Goodyear v. Phelps*, (3 *Blatchf. C. C. R.*, 91.) It ought to appear that Osgood has power alone to direct the use or the disuse of the apparatus, or, at least, a majority of the directors ought to be parties to the suit. And even then, it would be questionable whether the suit ought not to be brought in New Jersey, where the corporation is located, and carries on its business. (*Goodyear v. Chaffee*, 3 *Blatchf. C. C. R.*, 268.)

The motion for an injunction is denied.

CHARLES HALL vs. JAMES BIRD.

The object to be attained by the use of the machine described in letters patent granted to Charles Hall, August 30th, 1864, for an "improved machine for stretching chains," explained.

Where it is shown that a prior machine was constructed and used, and did not bodily disappear from view, but its existence and use were not made public, and the knowledge and use of it did not exist in a manner accessible to the public, and it had been substantially abandoned, and had substantially passed away from the memory of those who used it, until recalled to their

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memory by the success of a like machine, which was subsequently invented by another, the invention embodied in the latter machine cannot be regarded as having been previously known or used, within the meaning of the 6th section of the Act of July 4th, 1836, (5 *U. S. Stat. at Large*, 119.)

The first claim of the Hall patent claims the use of tongs or clamps which have a provision for grasping firmly the link or links to be stretched in the chain, without injuring other links; and any prior machine, to be an answer to such first claim, must be shown to have contained tongs or clamps having such provision.

The plaintiff being entitled to recover, but not having proved any specific amount of damages, six cents damages were awarded to him.

(Before BLATCHFORD, J., Southern District of New York, June 4th, 1869.)

THIS was an action on the case, for the infringement of letters patent granted to the plaintiff, August 30th, 1864, for an "improved machine for stretching chains." It was tried before the Court, without a jury.

Charles M. Keller, for the plaintiff.

Robert D. Holmes and *James F. Malcolm*, for the defendant.

BLATCHFORD, J. The specification of the plaintiff's patent says: "This invention relates to a new and useful device for stretching chains, those which are designed for working over pulleys, whereby the links are all brought to an uniform length, so that they will all engage with the teeth on the pulleys, or fit properly or snugly in recesses made therein. The great difficulty of driving machinery or shafting by means of pulleys and chains, has hitherto been owing to the variation in the links, some being shorter than others, so that many would not engage with the teeth of the pulleys, or fit properly in recesses made in the peripheries of the pulleys to receive them." The improved machine is described as follows: A framing is made, composed of two uprights, at some distance from each other, attached to a suitable base, and connected, near their upper ends, by a horizontal bar. To one side of this bar there is attached a gauge, composed of a bar having a groove made longitudinally in its upper surface, and curved notches at each side of the upper part of such groove, the

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notches being all of the same size, and at equal distances apart, corresponding precisely to the alternate links of an uniform and perfect chain. The ends of the handles of a pair of tongs are connected by links to a ring fitted on a hook in one of the uprights. The ends of the handles of a similar pair of tongs are connected by links to a ring which has a chain secured to it. The jaws of the two pairs of tongs have grooves made in their ends to receive the horizontal links of the chain to be stretched, the portions of the jaws at each side of the grooves grasping the upright links. By this means, the tongs are enabled to grasp firmly the chain to be stretched. The chain before spoken of as secured to the ring last mentioned, is fitted on a hook on the end of a swivel on a screw which passes horizontally through a nut attached to the other upright, the screw having a crank on its outer end. A portion of the chain to be stretched which has links of different sizes or lengths is fitted between the tongs, the chain on the hook is put in place, the screw is turned, and the portion of the chain between the tongs stretches, the pull or tension causing the tongs to grasp the chain firmly. Any portion of the chain, from one to any number of links, may be thus stretched, where necessary. The gauge is used for testing the chain after being stretched, in order to insure correctness and uniformity in the links, the groove receiving the vertical links and the notches the horizontal ones. By this arrangement chains may be stretched so that their links will be of uniform length to work perfectly over pulleys. The claims are, (1st.) The employment or use of the two pairs of tongs, or other suitable clamps, in connection with the screw, or its equivalent, arranged substantially as and for the purpose specified; (2d.) The chain, or its equivalent, in connection with the swivel, for conveniently connecting one of the two pairs of tongs to the screw, as set forth; (3d.) The gauge, when used in combination with the two pairs of tongs and the screw, or its equivalent, for the purpose specified.

This suit was commenced on the 24th of December, 1866. The notice of special matter of defence sets forth, that, at the

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time of the commencement of the suit, and for four years prior thereto, the defendant was using, for the purpose of stretching chains for pulley blocks, the same machine which the plaintiff claims to be an infringement on his patent, and that, for a period of eighteen years prior to August, 1862, the same machine, or one of the like kind that the defendant is using, was used for the purpose of stretching chains for pulley blocks by the deceased father of the defendant.

It is apparent, from the specification, that the plaintiff's machine is designed to stretch the links of a chain, so as to make all the links of the chain of a uniform length, that they may fit snugly in the recesses in pulleys. It is not designed to stretch the entire chain indiscriminately, or any given portion of it, without reference to the length of any particular link before or after such stretching, but it is designed to stretch each particular link which is, before such stretching, shorter than a prescribed length, while it is so arranged that no link shall be stretched which is not shorter than such prescribed length. This necessity requires, (1st,) that the two points where the chain is to be grasped for stretching it, shall not be always at a fixed distance apart, but shall be capable of being varied in their distance apart, so as, if required, to stretch a single short link that may be found interposed between two links of the proper length; (2d,) that the jaws of the tongs shall be so constructed, by being grooved or otherwise, as to grasp firmly any particular link, without injuring it or any other link. The great utility of the invention is beyond question. The evidence shows that it is impossible practically to make, by hand, the links of a uniform length, and that, if made thus uniform by hand, they will stretch in use, and stretch unequally, so as to produce difficulty in using the chain on a pulley with uniform recesses, and that the only feasible method of making a chain for use on such a pulley is to make the links shorter than the required length, and then take out the stretch of the metal by stretching each separate link to the proper gauged measure, by a machine like the plaintiff's.

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It is in evidence that the defendant's father, in 1852, procured to be constructed in New York, a machine for stretching chains, which had two pairs of tongs that grasped the chain, so that, by applying power, by means of a crank at one end, the chain was stretched. This machine he placed in a cellar, where he used it, keeping it concealed, however, from persons in general. The door of the cellar was kept locked, and, so far as appears, the existence of the machine was known only to the machinist who put it up, to the defendant's father, to the defendant's brother, and to the defendant himself. The defendant states, in his testimony, that the machine was locked up to keep people from seeing it; that his father always locked the door of the basement or cellar where it was, when he came out; that the machine was kept secret; that it was not used very often, perhaps not once in a month, or six months, or a year; that finally he took from off the machine a pair of boxes, which he wished to use for another purpose; and that the machine thereafter remained in the cellar unused until it was removed from there by him, his father having died in 1862. It also appears, that the machine was removed from this cellar into the defendant's shop in July, 1865; that, when taken out, it was in a rusty condition; that, prior to its being so taken out, the defendant, in making chains which required the links to be of equal lengths, stretched the links by hand, by means of a hammer and an anvil, and not by any machine; that, during 1864, the plaintiff's machine was described to the defendant by a workman who was at the time in his employ, and who had previously been in the plaintiff's employ and used his machine; and that thereafter the rusty machine was exhumed from the cellar, and cleaned and fitted up in the defendant's shop, and used to stretch the links of chains. It does not satisfactorily appear that, during the time that the machine in the cellar was used by the defendant's father, he made any chains which required the links to be stretched to a uniform length, or that he used the machine to stretch the links of chains to a uniform length.

On the foregoing facts, I think that this case fairly falls

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within the case of *Gayler v. Wilder*, (10 *Howard*, 477,) even assuming that the old machine, in the condition in which it was while in the cellar, was substantially identical in construction with the machine as used by the defendant after July, 1865, and with the plaintiff's machine. In the case of *Gayler v. Wilder*, one Conner had constructed, for his own private use, a safe substantially like the one patented to Fitzgerald, some time before Fitzgerald invented his safe, and had used it as a safe, for more than six years, in the counting-room of a type foundry. Its existence and use were known to the persons who worked in the foundry, although its particular internal construction, which was the point of the invention, does not appear to have been known to them. It then passed into other hands, but what became of it did not appear. Conner made but one such safe, and, after that one passed out of his hands, he used other safes, of a different construction. At the trial, before Mr. Justice Nelson, the Court charged the jury, that if Conner had not made his discovery public, but had used the safe simply for his own private purpose, and it had been finally forgotten or abandoned, such a discovery and use was not an obstacle to the taking out of a patent subsequently, by another person, for a safe of like construction, if he was an original, though not the first, inventor of such a safe. The jury having found in favor of the patent, the case was carried to the Supreme Court, by writ of error, and that Court held, Chief Justice Taney delivering its opinion, that the prior knowledge and use spoken of in the 6th section of the Patent Act of July 4th, 1836, (5 *U. S. Stat. at Large*, 119,) as necessary to invalidate a patent, must be a "knowledge and use existing in a manner accessible to the public." The Chief Justice says: "If the Conner safe had passed away from the memory of Conner himself, and of those who had seen it, and the safe itself had disappeared, the knowledge of the improvement was as completely lost as if it had never been discovered. The public could derive no benefit from it, until it was discovered by another inventor. And if Fitzgerald made his discovery by

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his own efforts, without any knowledge of Conner's, he invented an improvement which was then new, and, at that time, unknown; and it was not the less new and unknown because Conner's safe was recalled to his memory by the success of Fitzgerald's." The Court affirmed the correctness of the instruction to the jury above mentioned. Now, although the old machine, in the present case, was constructed in 1852, and had been kept in the cellar of the defendant's father, under the circumstances stated, and had been occasionally used there, and although it had not bodily disappeared from view, yet its existence and use were not made public, the knowledge and use of it did not exist in a manner accessible to the public, it had been substantially abandoned, and it had substantially passed away from the memory of those who used it, as is shown by the fact that, when they were called on to stretch the links of chains to a uniform length—a purpose to which it is not shown that the defendant's father ever applied the machine—it did not occur to them to use the machine for the purpose, until after they had learned of the existence and use of the plaintiff's machine. The knowledge of the machine was, therefore, as effectually lost as if it had never been constructed, and the public could derive no benefit from the invention embodied in it, until such invention should be discovered by another inventor. As it clearly appears that the plaintiff made his invention by his own efforts, without any knowledge of the machine in the cellar of the defendant's father, he invented an improvement which was then new, and was at the time unknown; and it was not the less new and unknown because the old machine was recalled to the memory of the defendant and of his brother, and of the machinist who put it up, by the success of the plaintiff's machine.

But, independently of this view, the defendant has failed to establish satisfactorily the identity of the old machine with the machine as used by him after its removal from the cellar, in an important particular. The specification of the plaintiff's patent states that the jaws of his tongs have grooves made in

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their ends to receive the horizontal links of the chain, the portions of the jaws at each side of the grooves grasping the upright links, and that, by this means, the tongs are enabled to grasp the chain firmly. In the use of the machine, this provision of the grooves is shown to be important, not merely to grasp firmly the link that is being grasped, but to avoid injuring it, or any other link. A like provision, by equivalent means, is found in the jaws of the tongs in the machine as used by the defendant since July, 1865; but such provision, so far as appears, was wholly wanting in the old machine, as it was while in the cellar. The proper construction of the first claim of the plaintiff's patent is, that it claims the use of the tongs, or other suitable clamps, embodying such a provision as is described in the plaintiff's specification, and as is found in the machine of the defendant, and as is not shown to have existed in the latter machine before July, 1865, for grasping the proper link firmly, without injury to it, or to any other link, in connection with the screw, or its equivalent, arranged substantially as and for the purpose specified.

On the evidence, the plaintiff is entitled to recover. The machine used by the defendant infringes the first claim of the plaintiff's patent. But, as the plaintiff has failed to prove any specific amount of damages, the finding will be for only six cents damages.

JOHN T. SEMMES, ADMINISTRATOR OF WILLIAM R. LUCKETT,
DECEASED

v8.

THE CITY FIRE INSURANCE COMPANY, OF HARTFORD.

A state of war, recognized as such by and between the belligerent parties, suspends all contracts in existence between the citizens of the respective belligerents at the time the war commenced.

Upon the termination of the war, obligations contracted before its commence-

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ment, between the respective citizens, though the remedy for their recovery is suspended during the war, are revived.

Where a policy of insurance against fire was issued by C., in Connecticut, in August, 1860, to L., a resident of Mississippi, on a building in the latter State, and a total loss occurred in January, 1861, during the life of the policy, and the policy contained a condition that no suit should be sustainable on it unless brought within twelve months after a loss, and this suit was brought on it in October, 1866: *Held*, that the contract of insurance, with all its incidents, including said condition, and all rights of action under the policy, were suspended during the continuance of the war which commenced, after said loss, between the so-called Confederate States, of which Mississippi was one, and the United States.

In determining when the rights suspended by such war revived, recourse can only be had to the Government of the United States, as the war was a civil war, in which the so-called Confederate States were defeated, and their organization, as a *de facto* government, was politically annihilated.

The Courts of the United States, in ascertaining when such war ceased, must look exclusively to the action of the President, or Congress, or both.

The President had authority to issue his proclamation of June 18th, 1865, (13 *U. S. Stat. at Large*, 763,) removing the restrictions upon intercourse with the States east of the Mississippi river, which had been in rebellion.

By virtue of that proclamation, the said contract of insurance, though suspended during the war, revived on the 18th of June, 1865, and was, from that date, in full force, with the right to sue upon it.

This suit, not having been brought within the time limited by the policy, exclusive of the whole period of disability, was held not to be maintainable.

(Before SHIPMAN, J., Connecticut, June 12th, 1869.)

THIS was a suit, commenced October 31st, 1866, on a policy of insurance against fire, issued by the defendants to William R. Lockett, of Mississippi, August 3d, 1860, upon a building situated at the Artesian Springs, in Madison county, in that State. It was tried before the Court, without a jury. It was conceded that a total loss occurred on the 5th of January, 1861, during the life of the policy, that the assured subsequently died, and that the defendants were liable to his administrator, in this suit, unless the right to recover was barred by lapse of time. Among the conditions attached to, and making part of, the policy, was the following: "It is furthermore expressly provided, that no suit or action of any kind against said company, for the recovery of any claim upon, or by virtue of, this policy, shall be sustainable in any

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court of law or chancery, unless such suit or action shall be commenced within the term of twelve months next after any loss or damage shall occur; and, in case any such suit or action shall be commenced against said company after the expiration of twelve months next after such loss or damage shall have occurred, the lapse of time shall be taken and deemed conclusive evidence against the validity of the claim thereby so attempted to be enforced." The defendants pleaded in bar the above condition in the policy. To this plea the plaintiff replied, setting up the following matters, by way of answer thereto: (1.) That, though the loss happened on the 5th of January, 1861, yet the defendants were, by the terms of the policy, to have sixty days after notice and proofs of loss within which to make payment, and that the assured, though then in life, could bring no action on the policy till after the lapse of the sixty days; (2.) That the policy was delivered, and the contract therein was made and to be performed, in the State of Mississippi, where the assured continued to reside until his death, and where his administrator had since resided; that the policy was made under, and with express reference to, a certain statute of said State, whereby it was the duty of the defendants to keep, during the life of the policy, an agent in that State, upon whom service of process might be made, and also funds in the same State, from which any loss which might occur might be paid or collected; that the defendants, in January, 1861, wrongfully revoked and discontinued their agency in that State, and withdrew all their funds therefrom, and, from that time to the commencement of the suit, had had neither agent nor funds therein, whereby the plaintiff had been wrongfully deprived of all means of instituting or prosecuting any action in that State, and of procuring therein any adjustment or satisfaction of the loss; (3.) That the assured, down to the time of his death, was a resident and citizen of the State of Mississippi, and that the plaintiff, during his whole life, had been and still was a resident and citizen of the same State; and that, from April 15th, 1861, to April 2d, 1866, a state of war between the so-called

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Confederate States, including the State of Mississippi, and the United States, existed, whereby all right of the assured during his life, and of his administrator since his death, to maintain any action against the defendants, was by law suspended, during all that time. The defendants traversed the replication.

The Court found the following facts: (1.) That the assured, from the date of the policy until his death, April 6th, 1865, was a citizen of, and actually resided in, the State of Mississippi; and that the plaintiff was his administrator, duly appointed and qualified in said State, and had, during all his life, been a citizen thereof, and an actual resident therein; (2.) That the plaintiff had taken out ancillary letters of administration in the State of Connecticut; (3.) That the loss against which the policy provided occurred on the 5th of January, 1861, and had never been paid; (4.) That the notice and proofs of loss required by the policy were duly furnished to the defendants; and that the sixty days therefrom expired April 11th, 1861; (5.) That, from the date of the policy to the 23d of January, 1861, the defendants had an agent and funds in Mississippi, as required by the law of that State; that, on the last-named day, they revoked the powers of their agent, so far as they could legally revoke the same, and had never appointed any other; and that, on the same day, they withdrew all their funds from said State, and since then had had therein no funds, nor any agent authorized to accept service of process, unless that power of their former agent continued, notwithstanding the defendants' formal revocation thereof.

William Hammersley and Henry K. W. Welch, for the plaintiff.

Charles R. Chapman and Alvan P. Hyde, for the defendants.

SHIPMAN, J. I pass the question whether the year in which the plaintiff, or his intestate, was bound, by the condi-

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tion in the policy, to commence suit or be barred a recovery, commenced to run upon the lapse of sixty days after the proofs of loss were furnished, as the result at which I have arrived renders that question immaterial.

The fact alleged in the replication and found by the Court, that the defendants revoked, or rather attempted to revoke, the power of their agent in Mississippi to accept service, may, also, be dismissed. If I should assume, as the plaintiff claims, that the law of Mississippi on the subject controlled the rights of the parties under the contract on this point, it would not support the inference which the plaintiff seeks to draw. There is no allegation that the agent personally left the State. The presumption, therefore, is that he remained there. If the law of Mississippi was binding on the defendants, requiring them to continue an agent in that State empowered to accept service, or upon whom service might be made, during the life of this policy, and until the loss under it should be paid, then the agent in question must be deemed to have possessed that power. The defendants conferred it upon him, and he continued to represent them in that capacity till January 23d, 1861, as is conceded on all hands. But it is found that they revoked this power of their agent on the last-named date, so far as they could. Yet, if the plaintiff's claim, that the statute of Mississippi on this subject made part of this contract of insurance, is good, then the defendants could not revoke this part of the agent's authority. One party alone cannot change a stipulation in a contract, either express or implied, which is to enure to the benefit of another. Assuming, then, merely for the purposes of this question, that the main legal proposition of the plaintiff on this point is correct, it follows that the power of the agent, or, to speak more accurately, his character as the representative of the defendants in this matter, still remained, notwithstanding their attempt to revoke it. Service that would have bound the defendants could still have been made on him. The suit could have been brought in Mississippi within the twelve

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months, as provided in the condition, free from any difficulty on this point.

Then, as to the withdrawal of their funds by the defendants. Whatever embarrassment this would have caused to the plaintiff or his intestate, it could not prevent or delay him from bringing his suit, and thus complying with the condition. He could have merged his claim in a judgment, and then pursued satisfaction in any other forum where property could have been found, unembarrassed by this twelve months' restriction. I advert but briefly to these points, as they were not pressed on the argument.

But a question of much more magnitude and difficulty remains to be considered. The replication sets up the late rebellion, and alleges that a state of war existed between the organization known as the Confederate States, including the State of Mississippi, and the United States, from the 15th of April, 1861, to the 2d of April, 1866, whereby it is claimed that this contract, and all right to sue upon it, was, during all that time, suspended. There is no allegation that the Courts of Mississippi, or the national Courts in that State, were closed for any specific length of time, or that the plaintiff, or his intestate, labored under any personal disability, arising out of his actual participation in the war, or that he was under the control of any *vis major*, beyond what the law implies from the state of war. The whole question, therefore, turns on the legal consequences of the war, in their operation on this contract, and the length of time these consequences continued.

It is, of course, conceded, that a state of war, recognized as such by and between the belligerent parties, suspends all contracts in existence between the citizens of the respective belligerents at the time the war commences. The authorities are uniform on this subject. The general rule is well stated by Mr. Justice Nelson, in the *Prize Cases*, (2 *Black*, 635, 687 :) "The legal consequences resulting from a state of war between two countries at this day, are well understood, and will be found described in every approved work on the

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subject of international law. The people of the two countries become immediately the enemies of each other—all intercourse, commercial or otherwise, between them, unlawful—all contracts existing at the commencement of the war suspended, and all made during its existence utterly void." This doctrine has been repeatedly recognized and applied to our late civil war by the Courts of this country, both State and national. (*Hanger v. Abbott*, 6 *Wallace*, 532; *Tucker v. Watson*, 15 *Am. Law Reg.*, 220; *Jackson Ins. Co. v. Stewart*, *Id.*, 732; *Conn. Mut. Life Ins. Co. v. Hall*, 16 *Id.*, 606.)

It is equally well settled, that, upon the termination of the war, obligations contracted before its commencement, between the respective subjects, though the remedy for their recovery is suspended during the war, are revived. (*Lawrence's Wheaton*, part 4, chap. 4, p. 877, 2d ed., and the cases above cited.) In *Hanger v. Abbott*, and *Jackson Ins. Co. v. Stewart*, this doctrine was applied to statutes of limitation. In the former case, Mr. Justice Clifford, speaking for the Court, says: "Where a debt has not been confiscated, the rule is undoubted, that the right to sue revives on the restoration of peace; and Mr. Chitty says, that, with the return of peace, we return to the creditor the right and the remedy. Unless we return the remedy with the right, the pretence of restoring the latter is a mockery, as the power to exercise it with effect is gone by lapse of time during which both the right and the remedy were suspended."

Applying these doctrines to the present case, it follows, that the war in which the people of Mississippi on one side, and those of Connecticut on the other, participated, suspended this contract, with all its incidents, including the condition set up in bar of this action, and all rights of action under it. In view of the result to which I have come, it is unnecessary to determine the precise date of the beginning of the war, when this suspension commenced. It is immaterial whether we take the 15th of April, 1861, as stated in the replication; or the date of the President's proclamation, (12 *U. S. Stat. at Large*, 1258,) calling for volunteers; or the 19th of April, 1861,

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when, by proclamation, (*Id.*,) he declared that an insurrection had broken out in certain States, including Mississippi, and declared his purpose to blockade their ports; or the 16th of August, 1861, when, in pursuance of the Act of Congress of July 13th, 1861, (*Id.*, 255,) he, by proclamation, (*Id.*, 1262,) formally declared the inhabitants of those States in insurrection, and announced the prohibition of all commercial intercourse between them and the inhabitants of the other parts of the United States. It is conceded, on all hands, that, at least from August 16th, 1861, this contract was suspended, both by the inevitable legal effect of the state of war, and by the interdiction of intercourse announced by the proclamation of that date. The rules of public law, as well as the Act of Congress referred to, lead to this result. Therefore, as the twelve months within which a suit could be legally brought on this policy had not expired when the war commenced, and thus imposed a disability on the assured, it becomes essential to determine whether this disability has been removed, and, if so, when that removal took place. It is conceded, in this case, that the disability has been removed, and the right to sue revived. The plaintiff not only admits, but must maintain, that this took place before October 31st, 1866, when he brought this suit. Otherwise, he could have no standing in Court. As the contract, and all remedies under it, were absolutely suspended by the war, no suit could have been brought while that suspension continued. But the plaintiff goes further, and alleges, in effect, in his replication, that the war ended, so far as the State of Mississippi and its inhabitants are concerned, on the 2d of April, 1866, the date of the President's proclamation (14 *U. S. Stat. at Large*, 811) to that effect, and not before. On the other hand, the defendants insist, that it ended as early as June 13th, 1865, when the President, by proclamation, (13 *Id.*, 761,) appointed a Provisional Governor over the State of Mississippi, and directed the United States District Judge for that judicial district to proceed to hold the Courts.

Now, it must be remembered, that, though this was a war

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between belligerents, attended, while it continued, by those legal consequences which public law always attaches to legitimate warfare, yet it was a civil war, in which the revolted party was defeated, and its organization as a *de facto* government, under the name of the Confederate States of America, politically annihilated. No treaty of peace, in the ordinary sense of that term, could have been negotiated, as but one of the parties which had waged the war was in existence, at its close, as a treaty-making power. Therefore, no such treaty has drawn the line where the war ended, and suspended contracts revived. We must, therefore, look to the acts of the only surviving party, to ascertain when those disabilities, legally imposed by the state of war, ceased. It is hardly necessary for me to say, that the principle here stated lends no support to the doctrine put forth in some quarters, and which that distinguished jurist, Mr. Justice Sprague, characterized as a "grave and dangerous error"—that the suppression of the rebellion conferred upon the United States the rights of conquest—the right to treat the States included in the rebellion as foreign territory acquired by arms, and to permanently divest them and their inhabitants of all political privileges. (*The Amy Warwick*, 2 *Sprague*, 143, 147.) That notion has nothing to do with the point now under consideration. The United States, in suppressing the rebellion, destroyed the political organization known as the Confederate States, and not the individual States as political communities. But, though the States remained after the contest ended, the belligerent power known as the Confederate States, which had represented them in the war, disappeared at its close. Neither of the States which remained had the power, or attempted, to negotiate a treaty of peace with the United States. In determining, therefore, when the rights suspended by the war revived, we must look to the action of the only power in existence which could effectually deal with that subject. This power was the Government of the United States.

It is a settled rule with the Courts of the United States,

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in ascertaining whether or not war exists, to look to the action of those departments of the Government to which that subject is confided by the Constitution. Courts never inquire, when investigating questions of this character, when active hostilities ceased. The termination of war, and the establishment of the relations of peace, are political acts, to be performed exclusively by the departments of the Government to which political powers and duties are entrusted. The action of those departments, when within the authority conferred by the Constitution, is conclusive and binding on the Courts as well as on citizens. When war has existed between the United States and a foreign country, its termination is easily ascertained by a reference to the treaty of peace which follows it, and which is consummated by the President, acting by and with the advice and consent of two-thirds of the Senate. As no such treaty did, or could, mark the close of this civil war, we must look to the action of the President, or Congress, or both, and from that action ascertain when the war ended, and when the legal consequences which flowed from it ceased to act in any given case.

I have already shown, that, by the rules of public law universally recognized among civilized nations, as well as by the decisions of our own Courts, the existence of this war suspended all contracts between the citizens of the respective belligerents, entered into before it commenced. It rendered, for the time being, all commercial intercourse between the citizens of the two sections unlawful, and converted them into enemies. But, in addition to this, Congress, on the 13th of July, 1861, passed the Act, before mentioned, authorizing the President, in certain cases, by proclamation, to declare the inhabitants of a State in insurrection against the United States, whereupon all commercial intercourse by and between the same and the citizens thereof, and the citizens of the rest of the United States, should become unlawful. In pursuance of that statute, the President, on the 16th of August, 1861, issued the proclamation before mentioned, declaring the inhabitants of certain States, including Mississippi, in insurrec-

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tion against the United States. By force of this proclamation, then, and the statute authorizing it, as well as by the legal effect of the war then existing, all pre-existing contracts between the people of the respective belligerents, including the right to enforce them by judicial proceedings, were thenceforth suspended. In progress of time, hostilities ceased, and the Executive department of the United States commenced a series of acts recognizing a change in the relations of the Government towards the inhabitants of the States lately in rebellion. On the 22d of May, 1865, the President issued a proclamation, (13 *U. S. Stat. at Large*, 757,) raising the blockade of most of the closed ports, and removing "all restrictions upon trade heretofore imposed in the territory of the United States east of the Mississippi river, save those relating to contraband of war, to the reservation of the rights of the United States to property purchased in the territory of an enemy, and to the twenty-five *per cent.* upon purchases of cotton." The same proclamation declared that all provisions of the internal revenue law should be carried into effect under the proper officers. On the 29th of May, 1865, the President proclaimed (*Id.*, 758) amnesty and pardon to all persons in the late revolted States, except certain specified classes, with restoration of all rights of property, except as to slaves, and except in cases where legal proceedings had been commenced for the confiscation of property of persons engaged in rebellion, on condition that they should take and subscribe a certain oath. On the same day he issued a proclamation, (*Id.*, 760,) appointing a Provisional Governor for North Carolina, and prescribing his duty and authority. On the 13th of June, 1865, he issued a similar proclamation, before referred to, relating to Mississippi. On the same day he issued a proclamation, (*Id.*, 763,) appointing a Provisional Governor over Tennessee, and declaring, among other things, "that all restrictions upon internal, domestic, and coastwise intercourse and trade, and upon the removal of the products of States heretofore declared in insurrection, reserving and excepting only those relating to contraband of war, as herein-

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after recited, and also those which relate to the reservation of the rights of the United States to property purchased in the territory of an enemy, heretofore imposed in the territory of the United States east of the Mississippi river, are annulled, and I do hereby direct that they be forthwith removed." The other provisions of this proclamation it is not necessary to notice here. On the 2d of April, 1866, the President issued a proclamation, before cited, formally declaring the insurrection that had existed in certain States, including Mississippi, at an end, and to be thenceforth so regarded. It should be remarked, that there was no Executive declaration, before that of April 2d, 1866, that the insurrection was ended in any State, except Tennessee. On the 13th of June, 1865, the President did, in the proclamation already cited, declare it terminated in the last-named State. In the proclamation of the same date relating to Mississippi, and in the one of May 29th, 1865, relating to North Carolina, he spoke of the armed forces of the rebellion as having been "almost entirely overcome."

We must now inquire into the legal character of the proclamations of the President restoring commercial intercourse between the States which had been engaged in the rebellion and the rest of the United States. And, first, as to his authority to issue such proclamations. I think there can be no doubt on that point. The Supreme Court of the United States has recognized the power of the President to, in effect, declare the inhabitants of the disaffected States in a state of insurrection as early as April 19th, 1861, when he set on foot the blockade of certain ports, including those in Mississippi. (*Prize Cases*, 2 *Black*, 635, 670.) In the opinion in those cases, Mr. Justice Grier, speaking for a majority of the Court, says: "Whether the President, in fulfilling his duties, as Commander-in-Chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions, as will compel him to accord to them the character of belligerents, is a question to be decided *by him*, and this Court must be governed by the decisions and

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acts of the political department of the Government to which this power was entrusted. He must determine what degree of force the crisis demands. The proclamation of blockade is itself official and conclusive evidence to the Court that a state of war existed which demanded and authorized a recourse to such a measure, under the peculiar circumstances of the case." There had been no declaration of war. Congress alone can declare war; but the Court held, in the same cases, that that body could not declare war against a State, or any number of States, by virtue of any clause in the Constitution. It also held, that the President had no power to declare or initiate a war, either against a foreign nation or a domestic State. It distinctly decided, however, that the President could, and did, recognize a state of war as actually existing, and that the Courts were bound to accept such recognition of the fact as conclusive. Of course, they must recognize the legal consequences which flow from the state of war. It would seem to follow, that, if the President has the power to recognize a state of war as an existing fact, and that this recognition is binding on the Courts, he must equally have the power to recognize a state of peace as an existing fact, and that the Courts are equally bound by such recognition. Especially would this seem to be the case in this civil war, where no formal treaty of peace could mark the line where war ended and peace commenced, and where there was no declaration of the legislature inconsistent with the proclamation of the Executive.

But, whether this is the true doctrine or not, it must be remembered, that the Act of Congress of July 13th, 1861, authorized the President to declare certain States in insurrection, whereupon all commercial intercourse was to become unlawful. On the 16th of August following, he issued such a proclamation. From that time forward, the interdiction of commercial intercourse had the double sanction of public law and a special Act of Congress, operating from the date of the proclamation. Now, it may be said with some force, that, inasmuch as commercial intercourse became unlawful under

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this Act of Congress, *ipso facto*, on the declaration of the President of the fact of insurrection, it must have continued unlawful until the insurrection was, by him or Congress, declared ended; and that, therefore, he could not legalize free intercourse between the citizens of the two sections, without first declaring the rebellion suppressed. But this would be a very narrow and technical view to take of a great public question, relating to an anomalous condition of public affairs, and bearing upon interests of infinite diversity and great magnitude. The Act of July 13th, 1861, was, by its express terms, to be operative as an interdiction of intercourse, only through a proclamation of the President. Congress left it to his discretion to put the interdiction in force. I think, by fair implication, it left with him the power to withdraw it. There were reasons of the highest public import why this power should remain with him. The war had commenced during a recess of Congress. It was necessary for the President to act promptly, and he called for troops, and set on foot a blockade, some time before Congress could assemble. Hostilities might cease, and the war be substantially terminated, during a recess of Congress, when prompt action by the President might be of the highest importance to our foreign and domestic commerce. This power of the Executive to restore pacific intercourse seems to have been practically conceded, without dissent from any quarter. Neither Congress, nor the Executive, nor the people have acted upon the assumption that intercourse between the people of the two sections in private civil affairs has been unlawful since June 13th, 1865. On the contrary, by the common consent of all departments of the Government, such intercourse was substantially free and unrestrained after that date as well as after the 2nd of April, 1866. Business began to seek its old channels, new contracts were made, old ones were litigated and enforced in the Courts of both sections, and money was invested at the South in various enterprises. No doubt would ever have arisen as to the validity of the President's proclamation removing all restrictions upon ordinary

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peaceful intercourse between the people, but for the subsequent struggle between Congress and the Executive department as to the political status of the Southern States. But that controversy has no proper relation to the question now under consideration. Congress has never, even by implication, declared commercial and peaceful intercourse of any kind unlawful since the President assumed to remove the restriction, on the 13th of June, 1865. On the contrary, its silence on this subject, when legislating on the purely political questions involved in what is called "reconstruction," supports the inference, that the ordinary civil pursuits of the people, and all the rights incident to them, including the right to free intercourse between the citizens of both sections, and the right to resort to legal civil remedies, were considered by Congress itself as no longer under the ban of war. I am, therefore, satisfied, that the authority of the President to issue the proclamation of June 13th, 1865, restoring free intercourse, was full and ample, and that its exercise has been acquiesced in by the national legislature.

We are next to consider what was the legal effect of that proclamation. Its language has already been cited. Beyond all question, it embraces all contracts thereafter to be made, and delivers them from the invalidating effect of public law, as well as from the effect of the statute of July 13th, 1861, and the proclamation made in pursuance thereof, August 16th following. Such contracts being valid, the right to enforce them in the Courts necessarily followed. A citizen of one section could sue a citizen of the other on such a contract, without having his suit defeated on the ground that it was invalid, either by public or statute law, or abated under the plea of alien enemy. Both the right and the remedy on such a contract were complete.

The question then arises—in what condition were the numerous contracts, existing when the war commenced, left by the proclamation of June 13th, 1865? Were they still suspended, and the parties without any right to enforce them? Undoubtedly, unpaid debts, contracted before the war, could

have been lawfully paid by citizens of one section to those of the other, at any time after the date of that proclamation. This would be exercising one of the privileges of "domestic intercourse," restored in express terms by that proclamation. It would seem to follow, that the right to enforce payment through ordinary legal remedies must have been restored also. It would be absurd to contend that the proclamation removed the prohibition to enter into new contracts, and left those entered into before, and existing at, the commencement of the war, suspended. Such a distinction would be unjust as well as absurd. It would be a distinction between rights of the same class, and could rest upon no principle of natural justice, good sense, or sound policy. No such construction should be given to a State paper like this proclamation. It was made in the interests of peace and its ordinary beneficent pursuits, and in furtherance of the rights of the people of both sections of a common country. No possible advantage in the way of convenience, interest, or security to the public or to individuals, consistent with justice, requires that its operation and legal effect should be thus contracted. It should, therefore, receive a liberal, rather than a narrow and technical, interpretation.

It follows, from these principles, that the contract upon which this suit is founded, though suspended during the war, while intercourse between the citizens of the belligerent sections was unlawful, revived on the 13th of June, 1865, and was from that date in full force. From that time there has been no legal obstacle to its enforcement. Whether Mississippi was without civil tribunals during any portion of the time since the contract revived, is not averred in the replication, nor was it proved on the trial. This Court cannot have judicial knowledge on that point. But it is immaterial. The plaintiff could have resorted to the State tribunals of Connecticut, or to this Court, at any time after his appointment as administrator. Not having brought his suit within the time limited by the policy, exclusive of the whole period of disability, the plea in bar is a conclusive answer to

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his right to recover. Judgment must, therefore, be entered for the defendants.

WILLIAM M. BAIRD

v8.

THE SHORE LINE RAILWAY COMPANY. IN EQUITY.

By the Act of February 19th, 1869, (15 *U. S. Stat. at Large*, 273,) authority was given to the Shore Line Railway Company to erect a drawbridge over the Connecticut river, although this Court had held, (*ante*, p. 276,) that such bridge would be an obstruction to navigation, and had enjoined its erection. The injunction was dissolved by the Court, because of the passage of such Act.

(Before NELSON, J., Connecticut, June 17th, 1869.)

THIS was a motion to dissolve the provisional injunction heretofore (*ante*, p. 276) issued in this cause.

Richard D. Hubbard, for the plaintiff.

Tilton E. Doolittle and *Henry B. Harrison*, for the defendants.

NELSON, J. This motion is founded upon the Act of Congress passed February 19th, 1869, (15 *U. S. Stat. at Large*, 273.) The legislature of the State of Connecticut passed an Act authorizing the defendants to erect and maintain a railroad bridge across the mouth of the Connecticut river. The second section provided that the bridge should be constructed and used so as not to be a substantial obstruction to the free navigation of the river, and should be provided with two draws, each of which should be of the width of at least one hundred and twenty feet; and that, during the season of navigation, the draws should be kept open, except when closed for the passage of engines and cars. Various other regulations were prescribed, to be observed by the defendants,

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which do not require to be particularly noticed. The third section provided, that the bridge and draws should be located and constructed in such manner, at such places, and upon such plan, as a board of engineers, to be appointed by the Superior Court of the State, should approve. The defendants, having procured the approval of such board, commenced the erection of the bridge, but were soon thereafter restrained from further proceedings, until the cause should be heard on pleadings and proofs, by a preliminary injunction issued by the Court, on the ground that the bridge would substantially obstruct the navigation of the river. In this posture of the case, an application was made to Congress on the subject, in pursuance of which the Act in question was passed.

It is claimed, on the part of the defendants, that this Act removes the objection taken by the Court to the erection of the bridge, and authorizes its construction according to the plan prescribed by the legislature of the State, and approved by the board of engineers, while it is insisted, on the part of the plaintiff, that, according to the true construction of the Act, the question still remains for the Court to decide, whether or not the bridge, as thus built, will present a substantial obstruction to the navigation.

This first section of the Act provides, that the consent of Congress is given to the erection of a draw-bridge over the Connecticut river, &c., by the Shore Line Railway Company, in accordance with the terms of a resolution passed by the General Assembly, &c. The second section provides, that the bridge, when completed in the manner specified in said resolution, and in the place, and in accordance with the plans of the board of engineers, &c., and in accordance with the requirements of the second section of the resolution of the General Assembly, &c., shall be deemed to be a legal structure, &c. The argument, on the part of the plaintiff, is, that, inasmuch as the first and second sections of the Act, which are relied on as legalizing the bridge, refer to one built in conformity with the requirements of the legislature of the State, and one of those requirements is, that it shall be so built as not to

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be a substantial obstruction to the navigation, if it can be shown, to the satisfaction of the Court, that it would be, if erected, the preliminary injunction should be continued—that the requirement referred to must be shown to have been complied with, in order to bring the case within the authority conferred by the Act of Congress. The argument is plausible. But I am not satisfied that it is sound, or can afford sufficient ground for disregarding the general intent of the Act, and the fair import of particular provisions of the same. The clause in the resolution of the legislature of the State is but declaratory of a principle of law, and added nothing to the legal effect of that resolution. If it had been omitted, the construction of the State Act would have been the same. Therefore, I am not satisfied that the Act of Congress, when it refers to the mode and manner of the construction of the bridge, and to the duties and obligations of the defendants, as prescribed in the State law, and, especially, in the second section of that law, has any reference to the principle of law there declared. It refers to the mode and manner of the construction of the bridge, and to the duties and obligations of the defendants as thus prescribed, that is, to the construction and use of the bridge.

The fourth section of the Act, I think, confirms this view. Congress there reserves the right to withdraw its consent to the erection of the bridge, in case free navigation of the river shall at any time be substantially obstructed. It should be remembered that, at the time of the passage of this Act, the Court had enjoined the erection of the bridge, on the ground, that, in its judgment, the bridge would, if erected, be a substantial obstruction. The question, whether it will be so or not, is not left to the Courts, but Congress seem to have taken it under their own charge, and to have admonished the defendants that, if the bridge shall, when built, turn out to be an obstruction, they will withdraw their assent to its erection, and leave the Courts to deal with it.

Another consideration worthy of note is, that, according to the construction claimed by the plaintiff, the Act would be

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without any force or effect, and utterly nugatory. The power to confer upon the defendants authority to build a bridge over this river, belonged to the sovereign State of Connecticut, and was not at all dependent upon Congress. This power, however, is subject to the qualification, that the bridge must be built so as not materially to obstruct the navigation of the river. So far as any impediment to the navigation is concerned, the power of Congress is paramount; but not beyond this. (*State of Pennsylvania v. Wheeling & Belmont Bridge Co.*, 18 Howard, 421, 430.) Unless this Act, therefore, was intended to confer authority to erect the bridge, notwithstanding this Court had held it to be an obstruction to navigation, it was, legally speaking, an Act without an object, and without any effect.* I do not inquire what opinions individual members of Congress may have held or expressed on this subject. I can look only to the Act itself, and ascertain the intent and meaning of the law-making power from its terms and provisions.

Upon the best consideration I have been able to give to the case, I think that it was the intention of Congress, by the Act in question, to legalize the bridge, constructed in the mode and manner prescribed by the legislature of the State; and, as a consequence, the preliminary injunction, heretofore issued, must be dissolved.

THE UNITED STATES vs. GEORGE B. DAVIS.

Whether the Attorney General has power to give a direction to a District Attorney, in respect to his official action in regard to an indictment found by a grand jury, and presented by such grand jury to the Court, for its action thereon, *quere*.

Such a direction, if given, is for the District Attorney alone, and does not control the Court.

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Where the Court refused to allow a prisoner, indicted for perjury, to read, in opposition to the motion of the District Attorney to proceed with the trial of the indictment against him, a letter from the Attorney General to the District Attorney, directing the latter to allow the prisoner an opportunity to place himself beyond the jurisdiction of the Court, and also refused to allow the prisoner to show that he had not been afforded such opportunity, and the trial was proceeded with, and the prisoner was convicted: *Held*, on a motion in arrest of judgment and for a new trial, that no error was committed.

Where a prisoner, indicted for perjury, was put upon his trial, and was present, with his counsel, during the empanelling of the jury, and during a portion of the opening of the case to the jury by the District Attorney, and was then removed from the court-room, by order of the Court, to an adjoining room, with liberty of access for his counsel, because he persisted in interrupting the District Attorney, in a loud voice, although admonished by the Court to refrain, and the opening by the District Attorney proceeded and was concluded during the prisoner's absence, and the prisoner was present during the rest of the trial, and was convicted: *Held*, on a motion in arrest of judgment and for a new trial, that no error was committed.

(Before BENEDICT, J., Southern District of New York, June 18th, 1869.)

THIS was a motion in arrest of judgment, and for a new trial.

BENEDICT, J. The defendant, who was indicted for having committed perjury in an affidavit made to procure the arrest of Joshua F. Bailey, Collector of Internal Revenue, having been found guilty by the jury, now moves in arrest of judgment, and for a new trial.

The first position taken on his behalf is, that the Court erred in granting the motion of the District Attorney to put the defendant upon his trial, and in refusing to allow the defendant to read, in opposition to that motion, the directions of Attorney General Evarts, contained in a letter dated February 11th, 1869, addressed to Mr. Courtney, then District Attorney, and to show that the defendant had not been afforded such an opportunity to leave the country as the Attorney General had, in such letter, directed he should have. This ruling, it is insisted, was erroneous, and it is claimed that the Court was bound judicially to recognize the instructions of the Attorney General, and, consequently, not to put the de-

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fendant on trial. I see no reason to doubt the correctness of the ruling complained of. If the Attorney General has power to give any directions whatever to a District Attorney, in respect to his official action, in regard to indictments found by a Grand Jury, and presented by such Grand Jury to the Court, for its action thereon, and if, assuming that the Attorney General has that power, such a direction as that claimed to have been given by the Attorney General in regard to this defendant, can be said to be fairly within its scope, it is certain that such a direction is for the District Attorney alone, and that it does not control the Court. The Court is not bound to construe or consider the official communications made to the District Attorney. That responsibility belongs to the District Attorney himself, who must act upon his own views of their validity and effect, and who, alone, is known to the Court as representing the United States in a criminal case. Accordingly, when the District Attorney moves the trial of a criminal case, he is, in the absence of any suggestion of collusion, entitled to have his motion granted, unless legal reasons to the contrary be shown. Neither the wishes nor the instructions of the Attorney General furnish, of themselves, such reasons, nor do his communications to the District Attorney afford evidence of the facts stated therein, upon which a Court can render a decision; while the fact that the defendant was sought to be put upon his trial without having been afforded an opportunity to place himself beyond the jurisdiction of the Court, although accompanied with the further fact that instructions to give him such opportunity were issued by the Attorney General, would not justify the Court in denying the motion of the District Attorney to proceed with the trial.

The next point urged in behalf of the defendant is, that he was not personally present during a portion of his trial. This point arises out of the following facts: The defendant was brought into Court in custody, and was present, with his counsel, during the empanelling of the jury, and during a portion of the opening of the case by the District Attorney.

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During the opening, he commenced interrupting the District Attorney, and persisted in denying his statements, in a loud voice, although admonished by the Court to refrain from interrupting. The action of the prisoner continuing to be such as to make it impossible to proceed in the trial with due decorum, he was ordered to be removed from the court-room by the marshal, and to be detained in an adjoining room, with liberty of access for his counsel. The trial then proceeded, under the objection of the prisoner's counsel; so far as to conclude the opening. The trial was then postponed to the next day, when, the defendant having become composed, it was continued and concluded without further disturbance. This statement seems sufficient to dispose of the point in question. The right of a prisoner to be present at his trial does not include the right to prevent a trial by unseemly disturbance. The defendant had the opportunity to be present at the whole of his trial. He was, in fact, present while the jury were being empanelled and the evidence was being introduced. He was absent during a part of the opening, only because of his own disorderly conduct. It does not lie in his mouth to complain of the order which was made necessary by his own misconduct, and which he could at any time have terminated by signifying his willingness to avoid creating disturbance.

In addition to the two positions I have thus noticed, several objections to the rulings of the Court upon questions of evidence, and to a portion of the charge, have been taken, but none of them are tenable, and they do not appear to be of sufficient importance or novelty to require a discussion here.

The motion is, accordingly, denied.

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SEPTIMUS CROOKES vs. HUGH MAXWELL.

In this case, the Court, on the motion of the plaintiff, made in 1867, opened a judgment recovered in 1862, and then paid and satisfied of record, in order to permit errors in the assessment of damages in the case to be corrected, the suit being one against a collector of customs, to recover back moneys paid, under protest, for duties, and the plaintiff not having been guilty of *laches*, and the errors being manifest.

(Before SMALLEY, J., Southern District of New York, June 21st, 1869.)

THIS was a motion, by the plaintiff, to set aside a judgment recovered in this suit on the 30th of September, 1862, the suit having been commenced in July, 1860, against the Collector of the port of New York, to recover back moneys alleged to have been illegally exacted by him as duties upon various goods imported from England and Wales, into the port of New York. The judgment was for the sum of \$4,989.08 damages and costs, and, on the 21st of October, 1862, the amount thereof was paid.

In April, 1863, another action was commenced in this Court, by the plaintiff against the defendant, which came on for trial in February, 1867, before the Court and a jury, upon the following agreed statement of facts, dated May 27th, 1864: " This action was commenced April 24th, 1863, to recover for an excess of duty paid to the defendant, as collector, under protest, on additions made for sea freights and transhipment charges, from Wales to Liverpool and London, and to make market value at the latter ports, on railroad iron imported into New York, between January, 1851, and May, 1853. It is agreed that the plaintiff is entitled to recover in this action, unless the Court shall be of the opinion that his claim is barred by the statute of limitations. It is further agreed, that the defendant, since the cause of action herein accrued, and before the commencement of this suit, was absent from the country, in England, one year and nine months. It is further

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agreed that, under date of February 1st, 1856, the Secretary of the Treasury issued a Circular, known as 'General Regulations, No. 63,' containing, among other things, the following instructions, namely: 'Freight or transportation from the foreign port of shipment to the port of importation is not a dutiable charge. In cases, therefore, of goods arriving in the United States, after having been first transported from the place of their production or manufacture to another port or place, whether in the same or another country, by land or by water, and thence transhipped for the United States—provided satisfactory evidence be adduced to the collector of the customs at the port where the said goods shall arrive, that they were originally shipped with the *bona fide* intention of having them transported to a port in the United States, as their final port of destination—no dutiable costs or charges will have accrued, either on the transportation from the first to the intermediate port, or while remaining in or leaving the latter, the voyage or transportation being regarded as continuous from the country whence originally exported, in good faith, on a declared destination for a port and parties in the United States. In illustration of the rule thus established, it may be remarked that, the evidence of final destination being satisfactory, no duties would be chargeable in ports of the United States, on the freight, or transportation, or charges in the intermediate ports, on goods originally from China, or Glasgow, or Cardiff, or Londonderry, to Liverpool, from Malaga to Valparaiso, from Dresden to Bremen, or from Basle to Havre, on the said goods being transhipped for the United States from the several intermediate ports enumerated.' It is further agreed, that, on the 17th of March, 1856, the plaintiff, by his counsel, filed with the proper officer under the collector, at the Custom-House, a statement of his several importations of railroad iron, on which he claims a return of duty on sea freight, and transhipment charges, for adjustment under the above instructions, a copy of that portion of it on which the duties were paid to the defendant, being annexed and marked A; that, under date of October 4th, 1856, the

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Secretary of the Treasury addressed to the Collector of Customs at New York a letter, of which the following is a copy : 'Treasury Department, October 4th, 1856. Sir : On application being made to you by Messrs. A. Iselin & Co., and others, of New York, you are authorized and directed to cause to be prepared the usual certified statements for return of "duty on freight," in cases where the same has been found to have been paid in excess, as decided by this Department in General Regulations No. 63, page 22, and under written protest, or transmit the same to this Department for its consideration. Very respectfully, your obedient servant, James Guthrie, Secretary of the Treasury. To H. J. Redfield, Esq., Collector of Customs, New York ;' that the plaintiff's claim was unadjusted when Mr. Redfield retired from the Collectorship, July 1st, 1857, and remained so until after Mr. Schell retired from the same office, in May, 1861 ; that, under date of May 21st, 1858, the Secretary of the Treasury addressed to Mr. Schell a letter, of which the following is a copy : 'Treasury Department, May 21st, 1858. Sir : I would call your attention to the instructions of the Department, dated October 4th, 1856, wherein authority is given to prepare and transmit the usual certified statements for return of duty on sea freight, paid under written protest. As the parties who represent several of the claims have made complaint of the delay attending the preparing of the same in your office, you are requested to have the above instructions complied with at your earliest convenience. I am, respectfully, Howell Cobb, Secretary of the Treasury. To Augustus Schell, Collector, New York ;' that, notwithstanding these instructions to Mr. Redfield and Mr. Schell, they both neglected to adjust the plaintiff's claim, and, on the 6th of July, 1860, he commenced a suit in this Court, for the recovery of the excess paid to the defendant on the several importations embraced in the said statement marked A, and, on the 23d of April, 1861, a verdict was had for the plaintiff, and, by order of the Court, the case was referred to the Collector for adjustment, according to the usual practice

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at that time, and, on the 25th of September, 1862, the Collector made a report to the clerk of this Court, of which the following is a copy: 'United States Circuit Court. Septimus Crookes vs. Hugh Maxwell. Custom-House, New York—Collector's Office, September 25th, 1862. Sir: The verdict in the above entitled case, as adjusted in this office, with interest to the 24th inst., amounts to the sum of \$4,934¹³/₁₀₀. Respectfully yours, C. P. Clinch, Deputy Collector. To Kenneth G. White, Esq., Clerk of the U. S. Circuit Court, Southern District of New York;' and that, the plaintiff relying on the truth of this report, judgment was entered upon it, September 30th, 1862, for \$4,934.13 damages and \$54.95 costs, making a total of \$4,989.08, which judgment was paid and satisfied of record October 21st, 1862. It is further agreed, that neither the plaintiff nor his attorney was consulted or advised with by the Collector, or by the person employed by him, in making said adjustment, nor had they any knowledge or suspicion that said adjustment was not correct, or that any items had been omitted, till some time in January, 1863, when it was discovered accidentally that a few items had been omitted, the extent of which was not ascertained till some time in April, 1863. This present suit is brought to recover the items so omitted in the adjustment of the verdict taken April 23d, 1861. The pleadings and papers in this suit, and also in the suit commenced July 6th, 1860, may be used by either party. The affidavit read on the motion to set aside the verdict in the case of *Masset v. Maxwell* and two other cases, argued in this Court in February, 1863, may also be read in this case. If the Court shall be of opinion, upon all the facts, that the plaintiff's claim is not barred by the statute, a verdict is to be rendered for him, for the excess paid under protest on such items as were omitted in the adjustment of the former verdict." Pursuant to the above agreed statement of facts, the following Treasury decision was put into the case, namely: "Treasury Department, May 18th, 1858. Sir: In the certified statements of claims of James Sawyer,

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Samuel A. Way and J. L. Wiggins & Co., for return of excess paid on storage, it would appear, from a portion of the dates of importation, that they are debarred by the statute of limitations of your State. The Department, therefore, before taking any action upon them, will require further information as to the fact, and also the various dates when the payments of the storage were made. I am, respectfully, Howell Cobb, Secretary of the Treasury. To A. W. Austin, Esq., Collector, Boston." "Custom House, Boston, May 20th, 1858. Sir: I am in receipt of your letter of the 18th inst., requesting information in respect to the claims of James Sawyer, Samuel A. Way and J. L. Wiggins & Co., for storage exacted in excess, portions of which, from the dates of importation given, appear to be barred by the statute of limitations of this State. By the Revised Statutes of Massachusetts, chap. 120, sec. 1, all actions of assumpsit or upon the case, founded on any contract or liability, express or implied, are required to be commenced within six years next after the cause of action shall accrue, and not afterward. The action of *Foster et al. v. Peaslee*, on the judgment in which this class of claims is allowed, was commenced in the May term of the Circuit Court, 1856. The case was argued at the October term, and decided by the Court against the Collector. At the May term, 1857, judgment was entered, and the decision acquiesced in by the Department, under date of June 16th, 1857. It has been the practice, in claims of this description, where a single case was tried to determine the law, to extend to all the claimants under the decision the advantages in respect to limitation acquired by the party bringing the suit, provided their claims were equally valid in other particulars. Thus, in the case in question, I deemed it proper to include in the statements all claims which accrued within a period of six years prior to May, 1856, when the action of *Foster* was commenced. This rule was adopted to prevent a multiplicity of suits for the same cause, which would otherwise be likely to be brought, and so to save expense to the United States. Under this

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rule, none of the items embraced in the statements referred to in your letter are barred. Assuming, however, that claims which accrued six years or more prior to June 16th, 1857, the date of the Department's acquiescence in the decision of the Court, are cut off by this statute, then the item of three dollars in the statement in favor of J. Sawyer is not allowable, the same having been paid on the 3rd of April, 1851. Very respectfully, your obedient servant, Arthur W. Austin, Collector. To Hon. Howell Cobb, Secretary of the Treasury, Washington." "Treasury Department, May 27th, 1858. Sir: Your report relative to the claims of James Sawyer and others for return of excess paid on storage, is received; and, the Department having concurred therein, you are informed that all cases of a similar nature must only include statements subsequent to May, 1850. I am, respectfully, Howell Cobb, Secretary of the Treasury. A. W. Austin, Esq., Collector, Boston." The affidavit in the case of *Massett v. Maxwell* referred to in the statement of facts, showed, among other things, that it was a practice at the New York Custom-House, up to 1861 or 1862, sanctioned by the Secretary of the Treasury, that, where a question had been decided by the Courts, and recognized and acquiesced in by the Treasury Department, the presentation to the Collector of the merchant's claim, under such decision, entitled him to recover on all items overpaid within six years prior to such presentation. No further testimony was offered, and the question of the statute of limitations was argued by counsel. The Court, (SMALLEY, J.,) in giving its decision, said: "No fact arises in this case, and the question which presents itself is one entirely of law. From the large amount involved, and from the precedent which may be established when it is finally determined, it is one of great importance. It is very clear that the equity is with the plaintiff, for, the agreed case, which has been presented to the Court, shows, beyond a doubt, that he is entitled to recover, unless barred by the statute of limitations. It admits that he has paid to the Government an amount of money, which has been illegally

exacted from him, and that, in equity, he is entitled to recover; but the Government claims that he is barred from such recovery by the statute of limitations. It appears, that he brought suit, and obtained a verdict, and that, according to the practice which then existed in this Court, the matter was referred to the officials at the Custom House, for the purpose of enabling them to make up their adjustment of the amount of damages. This was done, and they made up the amount, without giving any notice to the plaintiff or the plaintiff's counsel. They sent a certificate to the clerk, that the amount found to be due to the plaintiff was nearly \$5,000. Judgment was entered in pursuance of that certificate, and the plaintiff was paid that amount. Subsequently, it was ascertained that various items had been omitted in that adjustment for which the plaintiff was undoubtedly entitled to recover, and is now, unless barred by the statute of limitations. Now, in such a case as the one presented, if I could see any way, consistently with the well-settled principles of law which have been laid down for my guidance, in which I could get over this bar of the statute of limitations, I would cheerfully do it, and at once direct a verdict to be rendered in favor of the plaintiff. I confess, however, that I cannot see how this can be accomplished. It is claimed that various instructions were received from the Treasury Department to collectors at New York, Boston, and elsewhere, which amounted to a new promise in law. From 1863, down to the present time, a judgment against the collector cannot be enforced against him, so far as respects his property, and can only be satisfied at the Treasury Department, under the directions of the Secretary of the Treasury. The last promise which is relied upon was in 1858. At that time, the defendant had been out of office a number of years. Mr. Guthrie wrote the first letter in 1856, and Mr. Cobb wrote another in 1858, referring to that of 1856. In 1858, an execution could have been issued against the property of the defendant. Now it is claimed that, although the promise, when it was made, was not the promise of the defendant, the case does not fall within

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the statute of limitations of New York, because Congress, by changing the liability of the collector, changed the contract. The Court, in this case, is asked to give this new promise a construction which the law does not warrant, and thereby to remove a bar which the promise did not remove at the time it was made. That bar was removed by that promise in 1858, if it ever was removed. Consequently, I can see no other way, at the present time, after a careful consideration of this matter, and with a desire to avoid this bar, if I can, than to direct a verdict for the defendant, subject to the opinion of the Court. Should the Court, after further consideration, see any mode by which this bar can be removed, the verdict will be changed to a verdict in favor of the plaintiff, with an order of reference."

On the 20th of February, 1867, this motion to open the judgment of September 30th, 1862, was made, and, at a subsequent day in the term, judgment was rendered on the verdict in favor of the defendant, in the second action.

SMALLEY, J. The question arising in this case is, whether the plaintiff is entitled to have the judgment in the suit commenced in 1860 opened, and to have the errors made in the assessment of damages therein corrected. The power of the Court to open a judgment for the correction of such errors in the assessment of damages as are claimed to have been made in this case, is not denied; and, if it were, it is too well established, both in the State and the Federal Courts, to require authorities to sustain it.

It is claimed that the plaintiff has been guilty of *laches* in presenting and prosecuting this claim, and is, therefore, without redress, although the Government, through its officers of the customs, has, in violation of law, and against the decisions of the Courts, extorted from him quite a large sum of money, which it has heretofore refused to refund. It should be borne in mind, that all the invoices, entries, and other evidence to prove these claims, were in the Custom-House, subject to the examination of, and under the exclusive

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control of, its officers, and only accessible to the plaintiff by special favor; and that the plaintiff had no reason to distrust the correctness of the Custom-House adjustment of the 25th of September, 1862, at the time, although he had no knowledge when it was made. In looking into the matter, in January, 1863, he discovered some errors, and was then induced to make a further examination, in which he discovered many more, and, in April, 1863, he commenced a second suit, when he should have moved to open the judgment in this one. Immediately upon an adverse termination of the second suit, he made the present motion. By the bill of particulars filed in the second suit, on the 13th of May, 1863, the defendant was apprised of the full extent and character of the plaintiff's claim, so that but a small interval of time had elapsed after the filing of the Custom-House adjustment of September, 1862. Certainly, the plaintiff's delay, under the circumstances, ought not to defeat or prejudice his legal and equitable right to the money wrongfully withheld from him.

I regret that the Government of the United States should resort to such a defence, and do not believe that, upon mature consideration, it will persist in it. If the suit were one between citizens only, a defendant would badly tarnish his reputation by insisting upon such a defence, and few lawyers would be willing to stand up in Court and defend his cause.

It is ordered, that the judgment rendered on the 30th of September, 1862, for the amount reported by the Custom-House officers, be vacated; that the order of reference made in the suit be revoked; and that the assessment of damages therein be referred to Kenneth G. White, Esquire, United States Commissioner, under the same rule as to notice, and other questions thereto appertaining, as was prescribed by this Court in the case of *Benkard v. Schell*; and that, upon such assessment, the defendant be credited and allowed the amount paid on the 21st of October, 1862, as appears of record.

HENRY A. STRONG AND EDMUND F. WOODBURY

vs.

REUBEN NOBLE AND OTHERS. IN EQUITY.

The invention covered by letters patent granted to Henry A. Strong and Edmund F. Woodbury, December 18th, 1866, for an "improvement in whips," on the invention of Woodbury, is a patentable invention.

Although a tubular knit fabric was old, and although a whip was old, and although the idea of covering a whip and a whip-handle with something was old, the application, in the manner shown in that patent, of such a knit fabric to the covering of a whip, to produce a whip or a whip-handle covered with such a fabric, substantially as described in that patent, was not merely applying such knit fabric to a new use, in the sense in which, in the law of patents, the mere application of an old article to a new use is held not to be the subject of a patent.

Where a fabric is knit, by machinery, in flat strips, of the proper width to form a tube of the required diameter, and projecting loops are then produced on each edge of the strip, and those loops are then interlooped with each other, by a crochet needle, by hand, forming the same stitches as in the rest of the fabric, and making it impossible to tell where the union was effected, or that the fabric was not knit wholly by machinery, the resulting fabric is a fabric brought into a tubular form wholly by knitting.

Such fabric is substantially the tubular knit fabric of the patent of Strong and Woodbury.

It is no infringement of that patent to make and sell whips covered in whole or in part by a covering made of threads of warp and weft interwoven.

(Before BLATCHFORD, J., Southern District of New York, June 22d, 1869.)

THIS was a final hearing, on pleadings and proofs.

Stephen D. Law, for the plaintiffs.

F. A. Brooks, for the defendants.

BLATCHFORD, J. The bill in this case is founded on letters patent, granted to the plaintiffs on the 18th of December, 1866, for an "improvement in whips," the plaintiffs being the assignees of the plaintiff Woodbury, as inventor. The spe-

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cification contains the following statement of the nature and utility of the invention: "My invention consist in using a knit fabric for the cover of the handle or other portion of a whip. The benefits arising from constructing a whip with such a cover are these: First, it makes a more ornamental cover than ordinary plaiting, and looks equally as well or better than what is termed a 'worked' cover; second, the cost of such a cover, especially for the handle of a whip, is much less than that of covers 'worked' by hand, and is more durable. I design to use this cover principally for the handles of whips, where there is more wear than on any other parts of the whip, but it can be used for any other portion or for the entire whip." The specification then describes the manner in which the inventor covers the whip or the handle with such knit fabric. It says: "The fabric is first knit on to a machine, just as ordinary plain tubular knitting is produced, of a size proper to permit of its being drawn on the body of the whip. I then usually turn the fabric 'wrong side out,' as I think it is more ornamental for this purpose; but this is a matter of choice, and not essential. When the body of the whip has been prepared for the cover, I take a piece of the knit fabric of the length desired, and draw it on the body of the whip to the desired place. Then, after fastening the cover at one end in any suitable manner, if it is not as close a fit to the handle as desired, I twist the other end around the handle, causing the rows of stitches to lie spirally around the handle. The twisting of the cover makes it smaller, and causes it to fit closely to the handle, and also improves the looks of the handle so covered. After the cover is fitted on as above described, I apply one or more coats of glue or sizing, which cause it to adhere firmly to the handle, or body, of the whip, in every place." The claims are as follows: 1. A whip, having the handle, or any other portion, covered with a knit fabric, substantially as herein described. 2. Covering the handle, or any other portion, of a whip, by drawing on the same a piece of tubular knit fabric, and fastening it thereon in any suitable manner, substantially as and for the purpose herein described.

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The first defence set up is, that the invention patented is not a patentable invention. It is urged that the knit fabric, referred to in the first claim, is a tubular knit fabric; that it appears, by the evidence, that tubular knit fabrics were known and used, for various purposes, before Woodbury applied such a fabric to the covering of whips; that the application, in accordance with the patent, of such a knit fabric to the covering of a whip is merely the application of an old article to a new use; and that, therefore, the patent is void, as respects the first claim. The conclusion by no means follows from the premise. Although a tubular knit fabric was old, and although a whip was old, and although the idea of covering a whip and a whip-handle with something was old, it by no means follows that the application, in the manner shown in the specification, of such a knit fabric to the covering of a whip, so as to produce a whip, or a whip-handle, covered with such a fabric, substantially as described in the patent, is merely applying the knit fabric to a new use, in the sense in which, in the law of patents, the mere application of an old article to a new use is held not to be the subject of a patent. Such applications are of this character—using an umbrella to ward off the rays of the sun, it having been before used to keep off the rain; eating peas with a spoon, it having been before used to eat soup with; cutting bread with a knife, it having been before used to cut meat with. To apply the principle here invoked, to avoid the first claim of this patent, would render void the mass of patents that are now granted. There is scarcely a patent granted that does not involve the application of an old thing to a new use, and that does not, in one sense, fail to involve any thing more. But the merit consists in being the first to make the application, and the first to show how it can be made, and the first to show that there is utility in making it. In the present case, the points of advantage, set forth in the specification, as attending the invention, are ornament, economy, and durability. It could not be told necessarily, *a priori*, without experiment, that these advantages would accompany the application of the knit fabric as a covering for the whip.

Another ground of defence urged is, that the defendants' whip-handles are not covered with a knit fabric, or, if they are, that such knit fabric is not made wholly by machinery, and is not made tubular wholly by machinery. The evidence is entirely satisfactory, that the fabric used by the defendants is a knit fabric, and not a woven fabric, within both the etymological and the technical definitions of a knit fabric. It appears, that, with a view to invade the patent, and, at the same time, to seem to evade it, the defendants have resorted to a discreditable and circuitous method of making a tubular knit fabric—a fabric which shall be knit, and shall also be tubular when ready to be applied to the whip. The patentee, desiring to use a fabric that is knit and tubular, does what every person proceeding in an honest and straightforward way would do. He uses a fabric which is knit in a tubular form on a machine, and which is in a tubular form when it is taken off from the machine on and by which it is knit. The defendants, it appears, knit their fabric by machinery, in flat strips, of the proper width to form a tube of the required diameter, and projecting loops are then produced on each edge of the strip, and those loops are then interlooped with each other by a crochet needle, by hand, forming the same stitches as in the rest of the fabric, and making it impossible to tell where the union was effected, or that the fabric was not wholly knit by machinery. But the interlooping by hand of the two rows of loops is knitting, and the fabric, when completed, and in a tubular form, is a knit fabric, and a tubular fabric, and a tubular knit fabric, and a fabric knit into a tubular form, and a fabric brought into a tubular form wholly by knitting, although a part of the knitting is done by machinery, and a part by hand. The patentee is not, because he describes his method of obtaining the tubular knit fabric to be to knit it by machinery, being bound to describe the best method, limited to that method of obtaining the fabric. The first claim is to the whip, or whip-handle, covered with a knit fabric, substantially as described. Assuming the patentee to be limited to a knit fabric put into a tubular form

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before it is begun to be applied to the whip, or the handle, the mode of putting it into such tubular form, provided it be knit, is of no consequence. It would seem, from the evidence, that the defendants resort to the extraordinarily circuitous method of knitting by machinery a flat strip, with a selvage on each edge, and then removing the two selvages by hand, thus disclosing the loops which are to be interlooped by hand by means of a crochet needle. In both cases, the fabrics have the characteristics which distinguish knitted from woven fabrics, of being formed by the interlooping of loops with each other, and of being elastic in every direction.

The fact that the handles of whips had before been covered with leather tubes drawn over the same, and with woven fabrics, is no answer to the patent. The defendants, in so far as, in accordance with the Avery patent, they have made or sold whips covered, in whole or in part, by a covering made of threads of warp and weft interwoven, have not infringed the patent. But they have infringed it by making or selling whips covered, in whole or in part, with a knit fabric, substantially as described in the plaintiffs' patent. There must be a decree for an account, and an injunction, with costs. The question of the extent of their liability under such accounting will come up on the Master's report.

FRANCIS M. CLEMENT AND ELAM W. DITTERLINE

vs.

THE PHENIX INSURANCE COMPANY, OF BROOKLYN, N. Y.

Where an insurer sets up, as a defence to a policy of marine insurance, that the insured was advised of the loss of the subject insured before he procured the insurance, the insurer assumes the burden of proving such defence.

If the attempt is made to prove such defence, by showing that such advice was conveyed by a letter, it must be shown not only that such letter was sent, but that it was received.

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Knowledge of the loss, before insurance, possessed by a person who is not the agent of the insured for any purpose connected with procuring the insurance, is not notice to the insured.

(Before BLATCHFORD, J., Southern District of New York, June 25th, 1869.)

THIS was an action tried before the Court, without a jury.

Edwin W. Stoughton, for the plaintiffs.

James C. Carter, for the defendants.

BLATCHFORD, J. This suit is brought on a policy of insurance, issued by the Phenix Insurance Company, of Brooklyn, N. Y., to A. H. Cardozo & Co., "on account of whom it may concern," for the sum of \$15,600, on the 8th of August, 1867, on 52 hogsheads of tobacco, lost or not lost, valued at \$300 per hogshead, on transportation, by steamer and railroad, from Dycusburgh, Kentucky, to New York, being the property described in a bill of lading therefor, dated July 22d, 1867. The tobacco belonged to the plaintiffs, who resided at or near Dycusburgh. On the 22d of July, 1867, they placed it in charge of one McCoy, at Dycusburgh, who, by a written and printed agreement, then signed by him, in the shape of a receipt, or bill of lading, and in which he described himself as a contracting agent, contracted to deliver it, at New York, to A. H. Cardozo & Co., by a transportation which was to be by railroad all the way from Cincinnati, and over the Baltimore and Ohio railroad. The tobacco was shipped by McCoy, at Dycusburgh, on board of a steamboat, which carried it down the Tennessee river, to Paducah, where it was shipped on board of a steamboat, called the Mary Erwin, to be carried up the Ohio river to Cincinnati. The bill of lading was forwarded from Dycusburgh, by the plaintiffs, to A. H. Cardozo & Co., at New York, and was received by them on the 2d of August. The insurance was effected at New York, on the 8th of August. The Mary Erwin struck a log or snag,

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in trying to back off from a reef, on which she had grounded, on the morning of the 1st of August, about forty miles west of Cincinnati, and sank. The tobacco in question was submerged, and damaged by water. It was rescued, and taken to Cincinnati, and sold there at auction, under the direction of an average adjuster, and netted the sum of \$812.11.

The defendants have assumed the burden of proving, as a defence, that A. H. Cardozo & Co. were advised of the loss of the tobacco before they procured the insurance. I do not think this defence is satisfactorily made out by a preponderance of proof. The evidence relied on to show notice of the loss to A. H. Cardozo & Co. is entirely circumstantial. It is claimed that a letter was written and mailed by McCoy, at Cincinnati, on the 5th of August, addressed to A. H. Cardozo & Co., at New York, informing them of the loss of the tobacco. The receipt of that letter by A. H. Cardozo & Co. is not shown, and the two persons who composed the firm of A. H. Cardozo & Co. deny that it was received by them. The fact that a letter, written by McCoy at the same time, to the firm of R. L. Maitland & Co., of New York, informing them of the loss of some property of theirs on board of the *Mary Erwin*, was received by them, at New York, as early as the 8th of August, is relied on, in connection with testimony as to the regularity of the mail communication between Cincinnati and New York, and with the fact that a letter, mailed at Cincinnati, for New York, on the 5th of August, ought to have reached New York, in due course, not later than the 7th of August, to induce the conclusion that A. H. Cardozo & Co. must have received the letter, notwithstanding their denial, as witnesses, that they received it. But the fact that Maitland & Co. received the letter sent to them, and that the mail was regular, and ought to have brought to Cardozo & Co., by the 7th of August, a letter leaving Cincinnati on the 5th of August, is of no effect to show the receipt of such a letter by Cardozo & Co., unless it be clearly shown that such a letter was sent. The regularity of the mail, and the receipt of the letter by R. L. Maitland & Co., would rather

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serve to show that no letter was sent to Cardozo & Co., in view of the fact that the receipt of such a letter is denied by Cardozo & Co., and is not directly proved. No copy of the letter claimed to have been sent to Cardozo & Co. by McCoy is put in evidence, and, on the proofs, I am not satisfied that any such letter was sent. The burden of showing that such a letter was sent, as well as that, if sent, it was received, is on the defendants, and they have failed to make out either point. They must make out both, to establish their defence as to notice to Cardozo & Co.

It is also claimed by the defendants, that, as McCoy had notice in Cincinnati, as early as the 5th of August, of the loss of the tobacco, and as he was the agent of the plaintiffs to transport the tobacco to New York, and as they had put it into his custody, to be retained therein at least until it reached Cincinnati, he was bound to communicate notice of the loss to Cardozo & Co. by a telegraphic despatch; that, whether he did, or did not, communicate with Cardozo & Co., by writing to them, he was advised, by the face of the receipt, or bill of lading, or contract, which he entered into at Dycsburgh, that the tobacco was to be forwarded to Cardozo & Co., at New York, and that he was bound, immediately on hearing of the loss, to adopt the most speedy means of communication known to the commercial world, for imparting information of the loss to the consignees, in order to guard against a possibility of their effecting an insurance after the loss had happened; and that, in this way, notice to McCoy became, in law, notice to Cardozo & Co. In support of this view, the case of *Proudfoot v. Montefiore* (2 *Eng. Law Rep.*, *Queen's Bench*, 511) is cited. In that case, one Rees, the agent, at Smyrna, of the plaintiff, who was in England, purchased at Smyrna a cargo of madder, and shipped it to the plaintiff by a vessel which was stranded soon after leaving Smyrna, so that the cargo became a total loss. Rees learned, at Smyrna, of the loss, seven days before the insurance in England was effected by the plaintiff. It appeared that the fact of the loss might have been communicated to the plaintiff

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by Rees, by telegraph, and it also appeared, from a letter written by Rees, two days after he heard of the loss, to the plaintiff, but which was not received by the plaintiff until after the insurance was effected, that Rees abstained from telegraphing to the plaintiff, for the fraudulent purpose of enabling the plaintiff to insure. Chief Justice Cockburn, in giving the judgment of the Court, says: "We think it clear, looking to the position of Rees, as agent to purchase and ship the cargo for the plaintiff, that it was his duty to communicate to his principal the disaster which had happened to the cargo; and, looking to the now general use of the electric telegraph, in matters of mercantile interest, between agents and their employers, we think it was the duty of the agent to communicate with his employer by this speedier means of communication. From the letter of the agent, it appears that, but for the fraudulent motive for his silence, he would, in the ordinary course of his duty, have conveyed the intelligence of the loss to his employer, and would have availed himself of the telegraph for that purpose." On these facts, the Court held, that the plaintiff was so far affected by the knowledge by Rees of the loss of the vessel, and of the damage to the cargo, as that the fraud thus committed on the underwriter, through the intentional concealment by the agent, though innocently committed, so far as the plaintiff was concerned, afforded a defence to the underwriter, on a claim to enforce the policy. That case was, undoubtedly, on its facts, properly decided. But no such state of facts exists in the case at bar. Whatever the character of the agency of McCoy was, he was not the agent of the plaintiffs for any purpose connected with procuring insurance on the tobacco. In the case of *General Interest Insurance Co. v. Ruggles*, (12 Wheaton, 408,) the Supreme Court considered the question, as to how far the negligence or misconduct of an agent of an insured party, in withholding from such party knowledge of the loss of the subject insured, where the insurance was effected, lost or not lost, after the loss had happened, would affect such party, where it appeared that knowledge of the loss did not, in fact,

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reach such party until after the insurance was effected, and he acted in entire good faith. It held, that, if the agent guilty of the negligence or misconduct was the agent of the owner for any purpose connected with procuring the insurance, the owner would be chargeable with the loss. The Court say: "It is not, therefore, true, as a universal rule, that either the fact of loss, or the knowledge of such fact by the agent or the principal, at the time the policy is procured, will vacate it. But such knowledge must be brought home to some of the parties or agents connected with the business of procuring the insurance; and then the rule properly applies, which puts the principal in place of the agent, and makes him responsible for his acts." This doctrine must be regarded as the law of this Court, and of this case. Under it, a knowledge of the loss by Cardozo & Co., before they procured the insurance, would, of course, vitiate the policy. But a knowledge of it by McCoy cannot affect the plaintiffs. He appears to have been only a contracting agent, to solicit shipments of property, and, in view of his actual attitude toward the plaintiffs, and the extent and character of his agency, I am not disposed to hold that he was under any such obligation to communicate intelligence of the loss to Cardozo & Co., as would vitiate the insurance for his failure to do so. The bill of lading informed him that the tobacco was sent for account of the plaintiffs. He sent a notice of the loss, on the 5th of August, to the plaintiffs, at Dycusburgh, from Cincinnati, but they did not hear of the loss until the 15th of August, and did not receive that letter till after that time. The nearest telegraphic station to Dycusburgh was Paducah, thirty miles' distance. Even if it were shown that a telegraphic despatch, sent by McCoy to Paducah, could have reached the plaintiffs in season for them to have communicated by telegraph with Cardozo & Co., before the insurance was effected, I do not think that the agency of McCoy, or his implied legal obligation, through the plaintiffs, to the underwriters, was such as to make his failure to communicate by telegraph to the plaintiffs operate as a vitiation of the policy.

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I find for the plaintiffs, for the sum of \$16,543.57, as of the 9th of June, 1869.

JOHN A. CURRIER

vs.

THE WEST SIDE ELEVATED PATENT RAILWAY COMPANY, OF
NEW YORK CITY. IN EQUITY.

C. owned premises at the northeast corner of Fulton and Greenwich streets, in the city of New York, bounded, by deed to him, on the west, by the easterly side of Greenwich street, and, on the south, by the northerly line of Fulton street, but had no deed of any portion of the soil of Greenwich street. A corporation erected, in Greenwich street, in front of said premises, but outside of the lines thereof, one or more posts on which to lay an elevated railway. The corporation of the city of New York had theretofore exercised acts of ownership over the soil of Greenwich street, in front of said premises: *Held*, on a motion by C., on bill filed, for an injunction to restrain the construction of such railway, that C. had failed to make out that any property of his had been taken by the corporation.

Held, also, that, as the Legislature of New York had authorized the construction of the railway, in the manner in which it was being constructed, this Court could not interfere, by injunction, with such construction, on the ground that it was a nuisance.

The Acts of the Legislature of New York of the 22d of April, 1867, (*Sess. Laws of 1867, chap. 489*), and the 3d of June, 1868, (*Sess. Laws of 1868, chap. 855*), are not void, as containing a delegation of legislative authority.

Even if the railway were being constructed without authority of law, C., not owning in fee any of the land in Greenwich street, could not, in the absence of proof of special damage, maintain a suit to enjoin the construction of the railway.

(Before BLATCHFORD, J., Southern District of New York, June 29th, 1869.)

THIS was an application for a provisional injunction, to restrain the defendants from further prosecuting the construction of an elevated railway in the city of New York, in and through the length of Greenwich street, northerly, to the Ninth avenue, and thence, northerly, through the Ninth av-

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enue, to the Harlem river; and from interfering, in any manner, with the "enjoyment" of the plaintiff "in his possession" of "two lots on Greenwich street," and of the premises in front of said lots, to the middle line of said street, and from, in any manner, injuring or destroying the value of the said premises.

The defendants became incorporated, under the name of The West Side and Yonkers Patent Railway Company, as a corporation for constructing, maintaining, and operating a railway for public use, in the conveyance of persons and property, by means of a propelling rope or cable attached to stationary power, under the provisions of an Act of the Legislature of the State of New York, passed April 20th, 1866, providing for the creation of such corporations. On the 22d of April, 1867, an Act was passed by the said Legislature, (*Sess. Laws of 1867, chap. 489,*) authorizing the said corporation to commence and proceed with the construction of an elevated railway in the counties of New York and Westchester, in the manner and upon the route therein specified. The Act provided, that the propelling power for operating the railway should be cables attached to stationary engines; that there should be one track on one side of the street, on which the cars were to be moved in one direction, and another track on the other side of the street, on which the cars were to be moved in a contrary direction; that the track should be supported by iron columns, the size of which, at the surface of the pavement, and the length of the intervals between which, and the height of which track above the surface of the pavement, were prescribed; that the corporation might commence the construction of such railway at the southerly extremity of Greenwich street, near Battery place, and extend the same, northerly, along Greenwich street, for the distance of half a mile in length; that a stationary engine should be placed at about the centre of such half mile, to operate two lengths of propelling cable, extending about one-fourth of a mile northerly, and one-fourth of a mile southerly, with a loaded car; that such experimental line should be in readiness within one

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year from the passage of the Act, (legal delays excepted,) and then three commissioners, two of whom should be appointed by the Governor of the State, and one by the Croton Aqueduct Board of the city of New York, should proceed to inspect the railway, and its structures, and operating machinery; that, if the said commissioners should approve of the structures, plan, and operation of the railway, and should find that the same could be operated with safety and despatch, they should certify to such facts, by a duplicate certificate, of which one copy should be sent to the Governor, who, upon approving it, should cause it to be filed in the office of the Secretary of State, and one copy should be transmitted to the Mayor of the city of New York; that, thereupon, the corporation should be authorized to extend the lines of said railway, northerly, along both sides of Greenwich street, to Ninth avenue, and along both sides of Ninth avenue, or streets west of Ninth avenue, to the Harlem river; and that, in case the commissioners should not approve of the railway, and its plan of construction and operation, they should sign a certificate of the facts, with an order for the removal of the railway, and it should be removed. The Act used the following language: "The use of such railway, in the streets aforesaid, is hereby declared a public use, and consistent with the uses for which the Mayor, Aldermen and Commonalty hold the same." The last section of the Act was as follows: "This Act shall take effect immediately." On the 3d of June, 1868, an Act was passed by the said Legislature, (*Sess. Laws of 1868, chap. 855,*) in relation to the corporation, and its railway, which provided, that the time for constructing the experimental section should be extended six months; that the corporation might adopt such form of application of the propelling cable, or such other motor, as the commissioners should approve; and that the corporation might, in a certain specified manner, change its corporate name or title. The last section of this Act was as follows: "This Act shall take effect immediately."

The bill, after setting forth the Acts aforesaid, averred that

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the corporation duly changed its name to that by which it was sued; that it commenced the construction of a railway, with the intention of continuing the construction of the same from Battery Place and the southern extremity of Greenwich street, northerly, through Greenwich street, to the Ninth avenue, and thence, northerly, through the Ninth avenue, to the Harlem river, and was then engaged in so constructing the same, and had constructed about half a mile in length; that such construction had been approved in writing by the commissioners appointed under the Act of 1867, and their certificate of approval had been duly filed; that it was the intention of the defendants to endeavor to avail themselves of all the privileges purporting to be conferred by the Acts, and, for that purpose, to take possession of so much of the streets and avenues through which it was proposed to run the railway, and of the private property of the owners of the premises fronting upon said streets and avenues, as might be necessary to enable the defendants to construct the railway; and that the plaintiff was the owner of two lots on Greenwich street, of twenty-five feet in width, and situated in front of the said experimental line. The bill then contained this averment: "And your orator further avers, that he is the owner of the said lots in fee, in his own right, and that, as he is informed and believes, he is also the owner of the premises in front of the said lots, to the middle line of the said street, and that the said street never became the property of the city of New York, and that the city of New York has only an easement or right of way therein; that, upon said premises, there is a brick building erected, four stories high; that the defendants claim the right to construct their railway along the premises of the plaintiff, in the manner described in the Acts; that, if the said railway is so constructed, great and irreparable injury will occur to and be sustained by the plaintiff, for which he cannot have an adequate compensation at law; and that the placing of an elevated railway, in compliance with the description contained in said Acts, in front of said premises, will embarrass access to the front portion thereof, will darken the windows thereof,

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and obstruct the view therefrom, will impede and prevent the free circulation of air therein, and will, by reason of the noise of the proposed cars, seriously injure the said building, as a habitation; that the Acts referred to, and the rights claimed by the defendants as properly to be exercised thereunder, are in violation of Article 5 of the Amendments to the Constitution of the United States, which provides, that private property shall not be taken for public use, without just compensation, and of section 7 of Article 1 of the Constitution of the State of New York, which provides, that, when private property shall be taken for any public use, the compensation to be made therefor, when such compensation is not made by the State, shall be ascertained by a jury, or by not less than three commissioners, appointed by a Court of record, as shall be prescribed by law, and that the authority purporting by said Acts to be conferred upon the commissioners mentioned therein is in violation of section 1 of Article 3 of said last named Constitution, which provides that the legislative power of the State shall be vested in a Senate and Assembly; and that the erection of the railway in the manner now proposed, will be, and the same, so far as erected, now is, a nuisance." The bill prayed that the defendants might be decreed to have no legal right to construct their elevated railway in the manner proposed, along the route proposed, and that they might be enjoined, as above mentioned, and that the said proposed road, and the same, so far as then constructed, might be decreed to be a nuisance, and that the defendants might be decreed to remove the same.

Edwin W. Stoughton, Clarence A. Seward and George Stevenson, for the plaintiff.

William M. Evarts and Edward C. Delavan, for the defendants.

BLATCHFORD, J. The plaintiff has not furnished any description of either one of the lots referred to in the bill, claimed to be owned by him, but the defendants show that the plaintiff has a deed conveying to him the premises known as No.

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201 Greenwich street, being at the northeast corner of Fulton and Greenwich streets, and being bounded, in the deed, on the west by the easterly side of Greenwich street, and on the south by the northerly line of Fulton street. The plaintiff shows no other deed to himself of any premises, and no deed of any portion of the soil of Greenwich street, and the defendants show acts of ownership heretofore exercised by the corporation of the city of New York over the soil of Greenwich street, in front of the premises covered by the said deed. On this state of facts, it must be held, that the plaintiff has failed to make out that any property of his has been taken by the defendants. They have not entered or trespassed in any way upon the premises covered by the deed to the plaintiff. All that they have done in Greenwich street, in front of said premises, has been done outside of the lines of said premises. Whatever the presumption might be as to the ownership of the fee of the street, if the plaintiff's premises were bounded on the west on or by Greenwich street, instead of being bounded, as they are, by the deed, on the west, by the easterly side of Greenwich street, such presumption is rebutted by the language of the deed; and, even if such presumption, in case of a boundary on or by the street, would be that the fee of the soil of the street was owned by the plaintiff to the centre of the street, that presumption would be rebutted by the acts of ownership shown to have been exercised by the corporation of the city over such soil.

The only other question is, the one of a nuisance. If the Legislature has authorized the construction of this railway in the manner in which it is being constructed, this Court cannot interfere, by injunction, with such construction, on the ground that it is a nuisance. It is not contended that the actual mode of construction differs from the authorized mode of construction, if any construction is authorized by any valid law. The question, raised by the bill, as to taking private property for public use, being out of the case, the only other constitutional question raised is, whether the Acts in question are void, as containing a delegation of legislative authority to the commissioners mentioned therein. It is claimed that, in-

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asmuch as, by the Acts, the defendants have no authority conferred upon them to continue in existence the experimental half mile, or to extend the road, unless the commissioners shall approve, the Acts confer upon the commissioners legislative power. On this point, the authority of the case of *Barto v. Himrod*, (4 *Selden*, 483,) decided in 1853, is invoked. In that case, it was decided, that an Act of the Legislature in regard to free schools, which declared that the electors of the State should determine by ballot, at an annual election, whether such Act should or should not become a law, was unconstitutional and void, as being a delegation of legislative power. In the opinion of Ch. J. Ruggles, it is stated, that the Act did not, on its face, purport to be a law, as it came from the hands of the Legislature, for any other purpose than to submit to the people the question whether its provisions in relation to free schools should or should not become a law, and that, by one section of the Act, it was provided that the Act should become a law only in case it should have a majority of the votes of the people in its favor. The difference between the statute in that case and the Acts now under consideration are manifest. In each of the latter, there is an express provision that it shall take effect immediately. Its existence and validity, as a legislative enactment, are not made dependent, in any manner, upon any future event, or upon any action or nonaction, or approval or disapproval, by the commissioners. The continuance of the experimental half mile of railway, after it shall be constructed, and the extension of the road further, are, indeed, made dependent upon the approval of the commissioners. But the enactment of such a provision is no delegation of legislative power. Hundreds of statutes are passed by the Legislature, conferring contingent rights on individuals and corporations, dependent upon the doing of certain acts, or the making of certain certificates. In all general laws for the creation of corporations, the individuals who associate to form the corporation are required to file, in a certain place, a certificate, in a certain form, and, unless that is done, there can be no corporation; and yet, it was never contended, that the making of the creation of the

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corporation to depend upon the happening of such a future event, although lying wholly in the will of individuals, was a delegation of legislative power.

In *Corning v. Greene*, (23 *Barbour's S. C. R.*, 33,) decided in 1856, a statute provided that the corporation of the city of Albany should file their consent thereto, within a certain time after the passing of the same, or the bill should be void, and it was urged, that, as the statute was passed on condition that it should not be a law unless the corporation consented, it was not a constitutional exercise of legislative power. But it was held, that, as the statute emanated from the legislative will alone, and had an existence from that single source, it became a mere question of expediency when and how it should cease to exist; that, upon that question, the Legislature might properly exercise its judgment; and that, as it had exercised and given expression to it in the statute, the statute was not for that reason invalid, and the case was not within the principle of *Barto v. Himrod*.

In *Grant v. Couster*, (24 *Barbour's S. C. R.*, 232,) it was held, that a statute authorizing a town to borrow money, provided the consent of a certain proportion of the tax-payers was first obtained, was a statute in which the Legislature imposed a condition or restraint on the exercise of the power conferred, and that the imposing of such condition was as much the unaided emanation of the will of the Legislature as the conferring of the power itself. The Court say: "An Act granting power, to be exercised upon such conditions as the Legislature impose, is no delegation of legislative authority, nor is it invalid."

In *Bank of Rome v. Village of Rome*, (18 *N. Y. R.* 38,) decided in 1858, it was held by the Court of Appeals of New York, that a law which, by its terms, was to take effect immediately, but which conferred upon the authorities of a village certain powers which were not to be exercised until the Act had been approved by a vote of the inhabitants, was constitutional, and was not a delegation of legislative power, within the case of *Barto v. Himrod*.

Under the settled law of the State of New York, the Acts in question are, therefore, not repugnant to the Constitution

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of the State, as containing a delegation of legislative power. The Acts being valid, what is being done in accordance with their provisions cannot be regarded as a nuisance, to be interfered with by injunction.

It does not appear that any damage which the plaintiff is likely to sustain from the construction of this road will be different, in kind or degree, from that which will be sustained by every other lot-owner on the streets through which the railway will pass.* Under such circumstances, the case of *Osborne v. The Brooklyn City R. R. Co.*, decided by Mr. Justice Nelson, and Judge Benedict, in the Circuit Court of United States for the Eastern District of New York, in December, 1866, (5 *Blatchf. C. C. R.*, 366,) is an authority, binding on this Court, for the principle, that, as the plaintiff is not shown to be the owner in fee of any land in Greenwich street over which the railway will pass, he could not maintain this suit, in the absence of proof of special damage, even if it appeared that the defendants had no right to construct the railway in Greenwich street, and were erecting, or about to erect, a public nuisance. The Court say, in that case: "They do not propose to enter upon any land of the plaintiff's, and the damage occasioned by the road to the plaintiff will not be different, in kind or degree, from that sustained by every other lot-owner upon the avenue. It is damage resulting from the depreciation of the value of lots abutting on the street, by reason of a railroad running through it, in front of, but not over, the plaintiff's land. Now, it is well settled, that damage sustained alike by all the individuals of a large class, furnishes no foundation for an action on the part of a single individual of the class. (*Lansing v. Smith*, 8 *Cowen*, 146; *Davis v. The Mayor*, 14 *N. Y. Rep.*, 506.) It was incumbent, therefore, on the plaintiff, to show some special damage sustained, or likely to be sustained, by him, differing in kind from that sustained by the neighborhood, to entitle him to ask the interference of the Court in his behalf. No such damage is pretended to exist, and its absence is fatal to the plaintiff, on this motion."

The application for an injunction is denied.

Sykes v. The Manhattan Elevator and Grain Drying Company.

*

JAMES W. SYKES

vs.

THE MANHATTAN ELEVATOR AND GRAIN DRYING COMPANY
AND OTHERS. IN EQUITY.
*

Where, on a motion for a provisional injunction to restrain the infringement of letters patent for a floating grain dryer and elevator, the patent was not attacked for want of novelty, and the infringement was clear, but the patent had never been tried or established, at law or in equity, and no evidence was furnished as to its use, or as to the extent of such use, or as to acquiescence in the patent by the public, and the defendant showed that he had used his apparatus for about three years, and that no claim had been made against it under the patent until about six weeks previously, and the amount invested in the defendant's apparatus and business was large, and the business seemed to be precarious, and nothing appeared as to the defendant's responsibility, an injunction was withheld until the plaintiff should establish satisfactorily the point of acquiescence by the public, and show how the defendant's apparatus had been allowed to be used without interference, and leave was given to the plaintiff to renew his motion, on further papers, but the defendant was required to render sworn periodical accounts of the grain which should in future be treated by his apparatus, and to give satisfactory security, by bond, with sureties, to pay what might be recovered in the suit.

(Before BLATCHFORD, J., Southern District of New York, June 30th, 1869.)

THIS was a motion for a provisional injunction to restrain the infringement of letters patent.

Charles B. Stoughton, for the plaintiff.

Charles F. Blake, for the defendants.

BLATCHFORD, J. The papers in this case, on both sides, are exceedingly meagre and incomplete. The plaintiff's patent was granted April 15th, 1862. It has never been tried or established, at law or in equity, and no evidence is furnished as to its use, or as to the extent of such use, or as to acquiescence by the public in the patent, or in the exclusive

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right of the plaintiff under it, except the usual averment found in the bill, that the invention has been introduced into public use, and that the public generally have acquiesced in the plaintiff's exclusive right to the same. The novelty of the patent is not attacked, nor is the infringement denied. All that is said in defence, on the point of infringement, is, that the grain dryer which forms one element of the plaintiff's combination, is not used in the defendants' combination, but that they use a grain dryer secured by another patent. But they do not set forth what is the construction or arrangement of the grain dryer which they use, or in what particulars it is not the plaintiff's dryer, so that the Court can exercise a judgment on the question. In this respect, too, the plaintiff's affidavit is defective, for it merely states that the defendants' grain elevator and dryer is, in its construction and mode of operation, substantially like, and upon the same principles as, the plaintiff's elevator and dryer, in respect to the improvement secured to him in the patent, and is constructed and operated in all respects upon the principle of the plaintiff's patent, and is an infringement thereof. The plaintiff, however, verifies, by oath, a single model, which, he states, correctly represents the improvements and combination used by the defendants, and patented to the plaintiff. But nothing of all this is denied by the defendants, except to say that the dryer they use in their apparatus is not the dryer described in the patent. But the patent is not limited to any particular dryer. It claims the combining with an elevating apparatus, arranged upon a scow or other floating vessel, any interposed drying apparatus, the whole forming a floating grain dryer and elevator, capable of transferring grain from one vessel to another, or from a vessel to a storehouse, or *vice versa*, and of drying the grain while in the process of being transferred, and the whole apparatus capable of being easily floated from one locality to another, as may be required for the purpose of elevating and drying the grain. The specification states, that the patentee prefers to use Wheeler's dryer, patented October 23d, 1860, but that he can use, in its

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place, any dryer which will effectually drive the moisture from the grain to be dried and elevated. The infringement is, therefore, sufficiently established.

But, in addition to the want of satisfactory affirmative evidence, on the part of the plaintiff, as to the extent and character of the acquiescence by the public in his exclusive right, the defendants show that the apparatus now in use by them has been in use for about three years past, and that no claim was made against it, under the patent, until about six weeks ago. It is not shown that the plaintiff, who resides at Chicago, Illinois, knew of the existence or use of the defendants' machine, which has been used at New York. It is shown that the capital invested in the defendants' apparatus, and in the business of using the same, is about seventy-five thousand dollars. It does not appear that the defendants are pecuniarily responsible, nor is it shown that they are irresponsible. On the whole, an injunction must be withheld, until the plaintiff establishes satisfactorily the point of acquiescence by the public, and shows how it is that he has allowed the defendants' machine to be used for three years without interference; and he is at liberty to renew his motion, on further papers. But, as the patent is not attacked for want of novelty, and as the infringement of it seems clear, the defendants must render sworn periodical accounts of the grain which shall be treated by their apparatus in future, and must give satisfactory security, by bond, with sureties, to pay what may be recovered in the suit. It appears that the corporation which preceded the present corporation in the business, and from which the present corporation purchased the apparatus, became embarrassed, which would seem to indicate a precarious business. The details of the order will be settled on notice, if not agreed upon.

Gurney v. Hoge.

SAMUEL GURNEY AND OTHERS

vs.

WILLIAM HOGE.

Where, in an action of debt on a bond, in the penalty of £20,000 sterling, British money, conditioned for the payment of £10,000 sterling, with interest, the declaration claimed that the defendant should render to the plaintiff the £20,000, and averred that that sum was equivalent to the sum of \$140,000, United States' money, and the defendant pleaded: (1.) That neither the £20,000 sterling, nor the £10,000 sterling, with interest, was equivalent to \$140,000, United States' money, and that the defendant was not indebted to the plaintiff in the last-named sum; and, (2.) That the defendant did not owe, on an open or running account, for the payment of which the bond was given as collateral security, as much as \$140,000: *Held*, on demurrer, that both of the pleas were bad.

Held, also, that the plaintiff was entitled to judgment on the demurrer, and was, under the 26th section of the Act of September 24th, 1789, (1 *U. S. Stat. at Large*, 87,) entitled to recover from the defendant so much of the sum named in the condition of the bond, as was, according to equity, due to the plaintiff, and that, on the request of either party, such sum must be assessed by a jury; otherwise, it might be assessed by the Court.

(Before BLATCHFORD, J., Southern District of New York, June 30th, 1869.)

THIS was an action of debt, brought on a bond, under seal, executed by the defendant, on the 28th of January, 1859, to the plaintiffs, in the penalty of £20,000 sterling, lawful money of the kingdom of Great Britian, conditioned for the payment to the plaintiffs, by the defendant, of the sum of £10,000 sterling, with interest, at the rate of five per cent. per annum, from the 21st of December, 1858, as follows: £2,500 sterling, and interest, on the 1st of May, 1860; £2,500 sterling, and interest, on the 1st of August, 1860; £2,500 sterling, and interest, on the 1st of October, 1860; and £2,500 sterling, and interest, on the 1st of December, 1860. The declaration claimed that the defendant should render to the plaintiffs the sum of £20,000 sterling, lawful money of the kingdom of Great Britain, and averred that the said sum was equivalent and equal to the sum of \$140,000, lawful money of the United States of America. It then averred the execution of the bond, and

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that the penalty thereof, £20,000 sterling, was equal and equivalent to the sum of \$140,000 before demanded, and set forth, as a breach of the bond, the nonpayment of the said sum of \$140,000, lawful money of the United States, and laid the plaintiff's damages at \$100,000.

The defendant pleaded two special pleas. The first plea claimed oyer of the bond and of its condition, and set them forth. It then averred, that the defendant did not owe, and ought not to be charged with, the sum of \$140,000, lawful money of the United States, because the said sum of £20,000 sterling, of the money of the kingdom of Great Britain, was not equivalent or equal to the said sum of \$140,000, lawful money of the United States, nor was the said sum of £10,000 sterling, with interest thereon, mentioned in the condition of said bond, equal or equivalent to the said sum of \$140,000, lawful money of the United States, nor was he indebted to the plaintiffs in the said sum of \$140,000, lawful money of the United States. The second plea averred, that the defendant ought not to be charged with the said alleged debt, because he said that the bond was given as collateral security for the payment of an open or running account for moneys which might be due and owing from the defendant to the plaintiffs, and that the said open or running account, with interest, did not amount to the said sum of \$140,000, lawful money of the United States.

To these pleas the plaintiffs demurred, assigning, as causes of demurrer, that, although the plaintiffs, in their declaration, had demanded from the defendant a sum certain, due by virtue of a bond under seal, yet the defendant had not, in and by his pleas, denied the bond to be his deed, nor in any manner shown himself to be discharged therefrom; and that the defendant should have pleaded that the bond was not his deed, and that he did not owe the debt demanded.

Edwin W. Stoughton and Clarence A. Seward, for the plaintiffs.

William M. Evarts and Ashbel Green, for the defendant.

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BLATCHFORD, J. The pleas are clearly bad. The first plea merely alleges that neither the sum named in the penalty of the bond, nor the sum named in the condition thereof, with interest, is equal or equivalent to the sum of \$140,000, lawful money of the United States, and that the defendant is not indebted to the plaintiffs in the last-named sum. It was necessary for the plaintiffs, in order to make their pleading a correct one, to aver a sum in lawful money of the United States, to which the amount of the penalty expressed in the bond in foreign money was equal. But the first plea traverses no issuable fact which goes to the merits of the action. It does not deny the execution of the bond, or set up payment, or deny that the defendant owes the sum, in lawful money of the United States, to which the amount named in the condition of the bond is equivalent. It merely denies that the defendant owes, on the bond, as much as \$140,000. The plea professes to set up a defence to the bond, but sets up none. The second plea merely avers, that the defendant does not owe, on the open or running account, for the payment of which the bond was given as collateral security, as much as \$140,000.

There must be judgment for the plaintiffs on the demurrer. The 26th section of the Act of September 24th, 1789, (1 *U. S. Stat. at Large*, 87,) provides, "that, in all causes brought before either of the Courts of the United States, to recover the forfeiture annexed to any articles of agreement, covenant, bond, or other specialty, where the forfeiture, breach or non-performance shall appear by the default or confession of the defendant, or upon demurrer, the Court before which the action is, shall render judgment therein for the plaintiff, to recover so much as is due according to equity. And, when the sum for which judgment is rendered is uncertain, the same shall, if either of the parties request it, be assessed by a jury." In the present case, it is established, on this demurrer, and also by the confession of the defendant in his pleas, that the plaintiffs are entitled to recover from the defendant so much of the sum named in the condition of the bond as is, according to equity, due to the plaintiffs. The sum for which judgment

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ought to be rendered is uncertain, because the sums named in the condition of the bond are expressed in foreign money, and judgment can be rendered only for so much money of the United States, and evidence is necessary to arrive at the proper amount in the latter money. Therefore, if either of the parties request, the sum due, according to equity, on the bond, that is, the sum for which judgment should be rendered, will be assessed by a jury. The rights of the defendant will be fully protected by such a proceeding, for he will have an opportunity, on such assessment, or on the ascertaining by the Court, on evidence, of the amount for which judgment should be rendered, if no jury be requested, to raise all the questions he desires to raise as to the value of the pound sterling of Great Britain, named in the bond, in the money of the United States, and as to the true amount in such latter money for which judgment should be rendered, and as to whether the judgment should be rendered in one or another species of lawful money of the United States. So, also, the defendant will have an opportunity on such proceedings, to show how much is due on the account to secure which the bond was given. The course of practice, under the statute above cited, in a case like the present, is defined very clearly by Mr. Justice Washington, in the case of *United States v. White*, (4 Wash. C. C. R., 414, 416.) He says: "In cases, therefore, where the sum is uncertain, and a jury is requested by either party, the Court may either direct a writ of inquiry, or may swear a jury immediately, to ascertain the sum justly due to the plaintiff. If the sum for which judgment should be rendered be not uncertain, the Court, I conceive, is to ascertain it; if uncertain, and a jury be not requested, still the Court may, in its discretion, ascertain it, or submit the matter to a jury. But, under no circumstances, can a final judgment be entered for the forfeiture, or penalty of the bond, in the cases mentioned in this section."

An interlocutory order will be entered, giving judgment for the plaintiffs on the demurrer to the pleas, and reciting, that it appears, upon such demurrer, that there has been a

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forfeiture by the defendant, under the writing obligatory named in the declaration, and a breach and nonperformance thereof, and of the condition thereof, by the defendant, and ordering that the plaintiffs are entitled to judgment herein, to recover from the defendant so much as shall be found to be due to them, according to equity, on said writing obligatory, according to the statute in such case made and provided. The appropriate further proceedings will then take place before the Court or a jury, as the case may be, according to the statute.

THE UNITED STATES vs. JOHN D. McHENRY.

A challenge to a juror, for principal cause, is properly overruled, where it appears that the juror, although he has read about one-half of a column in a newspaper concerning the case, has never formed any fixed opinion, or made up his mind, respecting the guilt of the prisoner.

The decision upon a challenge for favor is not reviewable.

Where, on the trial of an indictment, evidence to show that a witness for the prisoner has made statements inconsistent with his testimony, is admitted without the attention of the witness having first been called to such statements, the error is cured, if the witness, on being afterward called by the prisoner, denies such statements.

On the trial of an indictment against a person who was an officer of the Internal Revenue, for perjury in swearing, on a criminal complaint made by him against another officer of the Internal Revenue, for taking a bribe, that he saw the bribe taken, it is not error to charge the jury that they may consider the circumstance, that it was not until some months after the time at which the prisoner said he saw the bribe given, that he made such criminal complaint.

Where, in an indictment for perjury, containing two counts, the first count charges the prisoner with having sworn to a false story, in an affidavit presented to a committing magistrate, as a criminal complaint, and the second count charges him with having sworn to the same false story, and also to other false matters, on an examination held by the magistrate on the complaint, and, on the trial, the jury are instructed that a verdict against the prisoner on the second count will not be inconsistent with a finding in his favor on the first count, it is not error to say to the jury, that, if they find against the prisoner

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on the first count, a verdict will almost certainly follow on the second count, there being no contradictory evidence, and no failure of full proof as to the taking of the oath by the prisoner, on the examination before the magistrate.

Where, in a indictment for perjury, the averments as to the materiality of what it alleges to have been falsely sworn to, are defective, the indictment is, nevertheless, good, if such materiality sufficiently appears upon its face.

What are proper averments of materiality, in an indictment for perjury, considered.

(Before BENEDICT, J., Southern District of New York, June, 1869.)

THIS was an indictment for perjury, tried before BENEDICT, J. After conviction, the prisoner moved in arrest of judgment, and for a new trial.

Joseph Bell, (Assistant District Attorney,) for the United States.

Edward D. McCarthy, for the prisoner.

BENEDICT, J. The several propositions which have been pressed upon my attention, with such commendable earnestness, in support of these motions, have received my careful attention.

The first error supposed to have been committed, consisted in overruling the challenge of the prisoner to the jurymen Brown. Upon this point, it seems sufficient to say, that the testimony of the juror showed, beyond question, that, although he had read about one-half of a column in a newspaper concerning the case, he had never formed any fixed opinion, or made up his mind, respecting the guilt of the prisoner. The authorities relied on by the defence are, therefore, not applicable to the present case. The most that could be said, upon the evidence, is, that a challenge for favor should have been allowed. But the decision upon a challenge for favor is not reviewable, (*The People v. Mather*, 4 Wend., 229;) and, if it were, I should feel bound to say, that the candid and cautious manner of the jurymen, together with

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his evident fairness, and freedom from bias, entirely satisfied me that the prisoner could receive no injustice at his hands.

The next point urged is, that an error was committed in permitting evidence to be given that the witness Ferguson had, on a certain occasion, made statements inconsistent with his evidence, without first calling the attention of the witness to the statement intended to be proved. The notes of the trial do not show such an error; and, if it was committed, it was cured when the defence afterwards called the witness Ferguson, and he denied entirely the statements attempted to be proved against him.

The next point taken arises upon the charge to the jury. It is insisted that it was error to charge the jury that they might consider the circumstance, that it was not until some months after the time at which the prisoner said he saw a bribe given to Harland, that he made his criminal complaint against Harland for the taking of the bribe. This objection is untenable. In the absence of any circumstances to indicate the existence of any reason for the failure of a revenue officer to make instant complaint of such an extraordinary transaction as the prisoner says he saw, so long a delay would be a circumstance to be considered, with the other facts proved, as affording ground for a reasonable inference that the complaint was an invention, arising out of malicious motives, and not based upon facts. Evidence of this nature has often been admitted in criminal cases.

The next point taken arises, also, out of the charge to the jury. It is claimed that it was error to say to the jury, that, if they found against the prisoner on the first count, a verdict would almost certainly follow on the second count. The first count charged the prisoner with having sworn to a certain false story, in an affidavit presented to Commissioner Gutman. The second count charged him with having again sworn to the same story, when called as a witness upon the examination held by Mr. Gutman on the complaint. There was no dispute as to the fact that he was sworn before Mr. Gutman on such examination, and that he then testified to

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the same story which he had before sworn to in his affidavit. Therefore, a finding that the story in the affidavit was willfully false, was decisive of the falsity of the story told on the examination. I am unable, therefore, to see how it was error to say this to the jury. The jury were carefully instructed that a verdict against the prisoner on the second count would not be inconsistent with a finding in his favor on the first count, because the second count contained other matters charged to have been falsely sworn to on the same examination, which were not included in the first count. But, as proof of any one of the assignments in the second count would sustain that count, (2 *Russell on Crimes*, 668,) a verdict against the prisoner on the first count left no room for doubt as to the verdict on the second count. Had there been any contradictory evidence, or any failure of full proof of the taking of the oath, on the examination as to the facts before Mr. Gutman, the remark to the jury would not have been made.

I have now disposed of all the points which have been argued in behalf of the prisoner upon these motions, except one, and that arises on the indictment itself. The indictment, it is insisted, is bad, because of defective averments of materiality.

The averment of materiality in the first count is, "that, at the time the said McHenry so deposed, swore and made affidavit, as aforesaid, it became and was a material question," etc., etc. In the second count, the averment is, that "it then and there became and was a material question." These averments are said to be insufficient, because they do not state that the evidence given by the prisoner was material upon the proceeding alleged to have been pending before the commissioner. Other proceedings, it is said, may have been at the same time pending before the commissioner, to which these averments would equally apply. But, if it be conceded that these averments are thus defective, still the indictment must, I think, be sustained, upon the ground that the materiality sufficiently appears upon its face. An examination of the averments will make this appear.

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The first count avers a complaint made by John M. Binckley, before Commissioner Gutman, that Rollins, Harland, Smith, Murray, Haggerty, and divers other persons had conspired together to defraud the United States, and had committed acts in furtherance of that conspiracy. It then avers, that the prisoner was produced by Binckley to support said complaint, and then swore to a certain written affidavit, the substance and effect of which are set out in detail. Here, then, is stated a proceeding before a committing magistrate of the United States, which made it incumbent on him to inquire as to the existence of the conspiracy complained of. The offence was charged by Binckley in the words of the statute, and the jurisdiction of the officer to institute such inquiry has not been called in question here. Among the parties embraced in this accusation were Thomas Harland and S. N. Pike, for, the affidavit of the prisoner identifies Pike as one of the persons referred to by the words "divers others," used by Binckley. The question, therefore, which the commissioner was to consider was, whether Harland, the Deputy Commissioner of Internal Revenue, and S. N. Pike, a rectifier, had been engaged in a conspiracy to defraud the United States. Now, the facts spread out in the indictment, as sworn to by the prisoner, tended directly to prove to the commissioner that the prisoner had seen Pike give Harland a bribe; for, these circumstances are of such a character as to show affirmatively a secret and collusive delivery by Pike, of his own check, for a large sum of money, to the Deputy Commissioner of Internal Revenue. Unexplained, these circumstances, as detailed in the indictment, would, of themselves, go far towards proving the existence of an unlawful combination between Pike and Harland. Manifestly, they were material facts tending to show the commission of an offence by the parties charged. It is not necessary that the facts sworn to should constitute full proof of the matter at issue. They are material if it can be seen that they would necessarily tend to prove it, which is this case. (2 *Russell on Crimes*, 643.) The first count of the indictment must, therefore, be held to be within the set-

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tled rule, that an indictment for perjury is good without any averment of materiality, when it appears upon its face that the fact alleged to have been falsely sworn to, was a material one. (2 *Russell on Crimes*, 639.)

One count of the indictment having been thus found to be good, it is unnecessary to consider the remaining counts. But, although I base my decision of this branch of the motion upon the ground that materiality appears upon the face of the indictment, I do not feel justified in dismissing the case, without remarking, in regard to the averments of materiality, that I incline strongly to the opinion, that they should be deemed sufficient. There seems to me to be much force in the argument, that the facts set out in this indictment leave no room for any fair supposition of the pendency of any other criminal charge than the one described, in which the facts sworn to by the prisoner could have been material. Furthermore, the words "it then and there became and was a material question," as they are used, are intended to, and do, convey the idea of a connection between the question and the proceeding previously mentioned as pending. It is, moreover, manifest, that there is no such uncertainty in these averments as could mislead the accused, nor is it pretended that he was misled. In point of fact, it has appeared upon two different trials, that the prisoner has distinctly understood, from this indictment, the exact facts which were intended to be proved against him. It is apparent, also, that the alleged uncertainty can occasion no detriment in the future, inasmuch as, if the accused should be again called to account for the same false statements proved upon this trial, it will be entirely competent to show, by testimony, that they formed the subject of this prosecution. Indeed, the indictment itself, without the aid of testimony, shows that these, and no other statements, could have been here proved under it. The indictment seems, therefore, to answer all the purposes of a valid indictment. It identifies the charge, and enables the defendant to prepare his defence thereto. It will protect the defendant, should he be again questioned on the

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same grounds ; and it enables the Court to know what judgment is to be pronounced according to law.

Two or three English authorities were cited in behalf of the defendant, where judgment was arrested by reason of averments of materiality similar to those contained in this indictment. I do not find that these authorities have been followed in any American case, while, in *The State v. Sleeper*, (37 *Vermont*, 122, 126,) they were disregarded, and an indictment more defective than the present one was upheld. If the decision of the present case depended upon the effect to be given to the averments of materiality, it might be the more prudent course to follow the English cases ; but I should greatly apprehend that, if such a decision were made upon the present indictment, it might well give occasion to apply the words of Lord Hale, where he says, (2 *Hale's P. C.*, 193): "More offenders escape by the over-easy ear given to exceptions in indictments, than by their own innocence ; and, many times, gross murders, burglaries, robberies, and other heinous and crying offences escape punishment, by these unseemly niceties, to the reproach of the law, to the shame of the Government, and to the encouragement of villainy, and to the dishonor of God."

•URIAH CUMMINGS AND OTHERS

vs.

THE AKRON CEMENT AND PLASTER COMPANY.

A service of a subpoena on a witness, in a civil suit, by a private person, not the marshal or his deputy, is a proper and legal service of a subpoena issued by this Court.

A person who attends this Court as a witness, on the request of a party, without the actual service of a subpoena, is entitled to his fees, and such fees may be taxed against the defeated party, under the Act of February 26th, 1853, (10 *U. S. Stat. at Large*, 161.)

(Before HALL, J., Northern District of New York, June, 1869.)

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SEVERAL witnesses for the defendants attended on the trial of this cause, without having been served with a subpoena by the marshal or his deputy, and it was on that ground insisted, that the fees of such witnesses could not be taxed against the plaintiffs.

HALL, J. Under the Acts of Congress, and the rules and practice of this Court, the forms of process and modes of proceeding therein are, substantially, such as were in use in the State Courts, under the Revised Statutes; and subpoenas issued for the purpose of compelling the attendance of witnesses, in civil cases, are not directed to the marshal, but to the witnesses themselves. In the State Courts, the practice has always been to enforce obedience to a subpoena, when served by a private person; and it is believed that such service would, in this State, be a proper and legal service of a subpoena issued by this Court.

I cannot doubt that a person who attends this Court, as a witness, on the request of a party, without the actual service of a subpoena, is entitled to his fees; and that such fees may be taxed against the defeated party. That, under former Acts of Congress, the witness was entitled to his fees against the party on whose behalf he had attended, has been decided in several cases, (*Dreskill v. Parish*, 5 *McLean*, 241; *United States v. Williams*, 1 *Cranch's C. C. R.*, 178; *Power v. Semmes*, *Id.*, 247;) and, as the service of process is, in fact, necessary only for the purpose of inducing such attendance, there is, in my judgment, no good reason, in the absence of legislation to that effect, for requiring the issuing of a subpoena, and its service by the marshal, in order to justify the taxation of the fees of a necessary witness, who attends, in good faith, without a subpoena. If the party is liable for the fees of such a witness, and succeeds in his suit, he is, I think, clearly entitled to tax such fees as costs, or as a disbursement, against the opposite party, notwithstanding the case of *Dreskill v. Parish*, (*ubi supra*), which may have been decided upon some ground peculiar to the law and practice of the Ohio Courts.

Ashcroft v. Cutter.

The phrase, "pursuant to law," found in the Act of February 26th, 1853, (10 *U. S. Stat. at Large*, 161,) must be held to apply to the attendance of witnesses before commissioners only ; for, the punctuation of the statute seems to disconnect this phrase from the prior part of the sentence, relating to attendance in Court ; and the subsequent provision of the same Act, which provides that "the amount paid printers and witnesses
* , * * shall be taxed," &c., "and be included in, and form a portion of, a judgment or decree against the losing party," without any restriction or limitation, must entitle the party to tax such fees. (See *McMillan v. Scott*, 2 *Bankrupt Register*, 28.)

I am not aware that this question has ever before been argued or formally decided in this District ; but, witnesses in criminal cases, who have actually attended without a subpoena, have been frequently paid, and, I think, with the knowledge and concurrence of Mr. Justice Nelson.

JOHN ASHCROFT

vs.

JAMES M. CUTTER AND OTHERS.

In an action for the infringement of a patent, the burden of showing, as a defence, that the patentee was a joint inventor, with some other person, of the thing patented, is on the defendant.

Where the oath of such alleged joint inventor was contradicted by that of the patentee, and the patentee was corroborated by the circumstances that he was a draughtsman and had taken out patents for several inventions made by him, and that the other person was not a draughtsman, or a designer, or an inventor, and had neglected, although eight years had elapsed since he knew of the patent, to apply for a patent himself for the invention, or to assert his right in the premises in any legal form, this Court sustained the patent.

(Before BLATCHFORD, J., Southern District of New York, July 13th, 1869.)

Ashcroft v. Cutter.

THIS was an action on the case, for the infringement of letters patent, granted to Arthur Neill, as inventor, January 22d, 1861, for an "improvement in moulds for shaping india-rubber pencil heads," and assigned to the plaintiff. By a stipulation in writing, it was tried before the Court without a jury. The stipulation further provided, that, if the plaintiff had judgment, it should be for the sum of \$10,000, and costs.

Albert Van Wagner, for the plaintiff.

Williams, Bates & Bonney, for the defendants.

BLATCHFORD, J. If the patent is valid, the infringement is admitted. The novelty, utility and patentability of the invention are, also, admitted, and the only question at issue in the case is, whether Neill was the original and sole inventor of the improvement, or whether one Francis P. Hale was a joint inventor of it with Neill. The burden of proof is on the defendants, to overthrow the *prima facie* title conferred by the patent. The testimony of Hale is directly contradicted by that of Neill, in all its material points, while the surrounding circumstances, that Hale was not a draughtsman, or a designer, or an inventor, and that Neill was a draughtsman, and had taken out patents for several inventions made by him, and that Hale has always neglected, it being nearly eight years since he knew that Neill had taken out a patent for the invention in question, to apply for a patent himself therefor, or to assert his rights in the premises in any legal form, corroborate the oath of Neill.

I find for the plaintiff, for the sum of \$10,000.

Doubleday v. Sherman.

WILLIAM E. DOUBLEDAY

vs.

FREDERICK SHERMAN AND HERMAN M. BOAS. IN EQUITY.

Where a defendant, in a suit in equity for the infringement of a patent, is advised of a decree against him therein, for a perpetual injunction, made on final hearing, and pays in full an execution issued for the taxed costs awarded to the plaintiff by the decree, and neglects, for eleven months after making such payment, to move to open the decree to let in a defence, it is too late for him to do so.

(Before BLATCHFORD, J., Southern District of New York, July 18th, 1869.)

THIS was a motion to dissolve the perpetual injunction issued in this case, and open the decree made therein on final hearing, to let in the defendants to defend. The suit was a suit in equity for the infringement of letters patent.

Daniel S. Riddle, for the plaintiff.

Charles B. Stoughton, for the defendants.

BLATCHFORD, J. 1. The defendants were advised of the decree as early as May, 1868, and yet took no steps to move to open it until April, 1869. They have, therefore, been guilty of such *laches* as not to be entitled to the favor they ask, as no excuse is shown for the delay.

2. By paying in full, in May, 1868, the execution issued for the taxed costs awarded to the plaintiff by the decree, without, before making such payment, taking measures to open the decree, the defendants have so affirmed the regularity and validity of the decree, as to make it impossible now for them to move to set the decree aside, or to open it to let in a defence.

In the Matter of Morris Kyler, a Bankrupt.

In re MORRIS KYLER, A BANKRUPT.

Where an appeal, purporting to be taken to this Court, under the 8th section of the bankruptcy Act of March 2d, 1867, (14 *U. S. Stat. at Large*, 520,) by a supposed creditor, whose claim is rejected, from the decision of the District Court, is not claimed, nor any notice of it given to the clerk of the District Court, and to the assignee, within ten days after the entry of the decision appealed from, this Court will dismiss the appeal.

(Before BLATCHFORD, J., Southern District of New York, July 18th, 1869.)

THIS was a motion to dismiss appeals taken to this Court from a decision made by the District Court on the 8th of May, 1869, rejecting and expunging from the proceedings herein certain debts, and the proofs thereof.

Adolph S. Sanger, for the creditors.

Cotterill Brothers, for the assignee.

BLATCHFORD, J. The evidence of the decision of the District Court is an order made by that Court, on the 8th of May, 1869, and filed in that Court on that day, rejecting and expunging such debts and proofs. The appeals were claimed, and notices given thereof to the clerk of the District Court, and to the assignee, as prescribed in the 8th section of the Act, by notices, each of which states that the appeal claimed is an appeal "from the decision of the Judge of the District Court aforesaid, made on the 8th day of May, 1869, refusing to allow the claim" of the appellant. These are the only appeals which appear to have been claimed, and the only notices which appear to have been given of any appeals. The 8th section of the Act provides, that where a supposed creditor, whose claim is rejected, appeals from the decision of the District Court to the Circuit Court of the ~~same~~ district, the appeal shall not be allowed, unless it is claimed, and notice thereof given to the clerk of the District Court and to the assignee, within ten days after the entry of the decision appealed from. In the present case, no appeal from such de-

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cision of the District Court was claimed, nor was any notice of any such appeal given within ten days after the 8th of May, 1869.

The point taken on the part of the appellants, that, because the order of the District Court, entered on the 8th of May, 1869, awarded to the assignee costs to be taxed, to be paid by the creditors whose debts were rejected, and ordered that the assignee recover judgment against them therefor, and have execution against them therefor, it was not an order from which an appeal could be taken, and that an appeal could be taken only from a decree to be entered, after the taxation of the costs, embodying the decision rejecting the claims and judgment for a sum certain, as taxed costs, only goes to show that the alleged creditors, in appealing from the decision, as a decision made on the 8th of May, 1869, appeared prematurely.

As the appeals from the decision actually appealed from were not claimed and noticed within ten days after the entry of such decision, they must be dismissed.

HORACE P. GOODRICH AND OTHERS

vs.

EMERY B. REMINGTON, RECEIVER OF THE BANK OF ONTARIO.

THE SAME

vs.

MILTON D. PACKARD, RECEIVER OF THE BANK OF CANTON.
IN EQUITY.

M., a private banker under the general banking law of New York, not being allowed by law to establish another private bank, established a joint stock bank under that law, under an agreement that the stockholders other than himself were to have no real interest in the bank, and they had none, and the

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bank was carried on under that arrangement. M. failed in business, and the bank failed, and a receiver of the bank was appointed by a State Court of New York. M. having been subsequently adjudged a bankrupt, his assignee in bankruptcy brought a suit in equity, in this Court, against the receiver, to compel a delivery of the assets of the bank to the assignee, for distribution in bankruptcy, as assets of M. : *Held*, that the relief could not be granted, and that the bill must be dismissed.

As the question was one on which it was proper to ask the opinion of the Court, and as the assignee, in filing the bill, acted under the advice of eminent counsel, no costs were allowed to the defendants.

(Before HALL, J., Northern District of New York, July 14th, 1869.)

THE plaintiffs in these cases were the assignees in bankruptcy of Hiram J. Messenger. The defendants were, respectively, receivers, appointed by the Supreme Court of the State of New York, in separate proceedings, instituted against the Bank of Ontario, and against the Bank of Canton, severally and respectively, as insolvent banking associations, organized under the general banking law of the State of New York. The plaintiffs, by their bills, asked decrees from this Court, declaring the property in the hands of such receivers, and claimed by them as property and assets of such insolvent banking associations, to be the property and assets of the bankrupt.

HALL, J. The facts upon which the rights of the parties, in these suits, depend, are substantially the same in the two cases, and they may, therefore, be properly disposed of upon the same grounds.

The bankrupt, being already a private banker, under the general banking law, at Cortland, determined, some years since, to establish a bank at Canandaigua, and, at a subsequent period, determined to establish another bank at Canton; but he could not establish such banks as a private banker, under the general banking law, because he already had such private bank at Cortland. Therefore, for the purpose of establishing the bank at Canandaigua, he executed, in connection with William Richardson, Merrick Munger, John C. Draper, and James H. Tripp, a certificate of the organization of the Bank of Ontario, in due and proper form. The exe-

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cution of this certificate was duly acknowledged, and it was then recorded in the clerk's office of Ontario county; and the other formal acts necessary to the organization of a banking association, as contemplated by such certificate of organization, were done, as required by the general banking law of New York. By this certificate of organization, and the subscriptions thereto, it appears, that the capital stock of the association was fixed at \$100,000, and divided into one thousand shares of \$100 each; and that, of these, the bankrupt subscribed for 920 shares, and the other four associates for 20 shares each.

The Bank of Canton was organized in the same way, the capital stock and number of shares being the same, and the associates being the bankrupt, who subscribed for 950 shares, and C. W. Heaton and Charles H. Stevens, who subscribed for the additional 50 shares, Heaton subscribing for 20 shares, and Stevens for 30 shares.

It is claimed, and may be considered as proved, that these banks were, in fact, established for the sole benefit of the bankrupt; that, as between him and the other associates, it was agreed that the other associates were not to be called upon to pay up their subscriptions, and were to have no real interest in the bank; that, in fact, they never paid any thing on such subscriptions; and that, from first to last, the bankrupt managed and controlled all the operations of these banks, without any interference from the other associates, without any board of directors, and, as between himself and the other persons who had signed the certificates of organization, in all respects, in substance, as though they had been his individual banking establishments. The required returns to the Banking Department of the State were, however, duly made, and the other forms of keeping up the organization and operations of these banks, as banking associations, as contradistinguished from a private banking establishment, were observed and maintained; and the transactions and business of such banks, with their depositors and dealers, were carried on in the name, form, and manner of similar transactions and business of actual legal banking associations, organized and carried on in good

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faith, and without fraud, either against the State, in its corporate character, or against its citizens, as individuals. Under these circumstances, the Bank of Ontario, either without ever having had a dollar of capital, or without having had any capital paid in that was not very soon thereafter withdrawn by the bankrupt, carried on business for several years, and its deposits, at one time, amounted to more than \$340,000. The operations of the Bank of Canton were more limited, and its deposits were much less. The failure of the bankrupt, at his banking house in New York city, at once caused the failure of these two banks, and of his private bank at Cortland. At the time of these failures, the bankrupt was indebted to the Bank of Ontario, to an amount exceeding \$160,000, and to the Bank of Canton, to an amount exceeding \$29,000, in addition to his possible liability for the whole amount of stock subscribed by him in those banks respectively. It is probable that his assets were not then sufficient to pay more than 30 or 35 cents on the dollar of the claims of his general creditors.

The plaintiffs, as assignees in bankruptcy, insist, that the acts of the bankrupt and his associates, in perfecting a formal organization of the Banks of Ontario and Canton, as banking associations, and in carrying them on as such for years, for his individual profit, making verified, but false, returns to the Banking Department, in the forms of those required by law to be made by banking associations, and holding out these banks to the public as banking associations duly organized, and recognized by the laws of the State as corporations having a legal existence, with legal franchises, corporate property, and clearly defined rights and liabilities, entirely separate and distinct from the individual existence, property, rights, and liabilities of the bankrupt, was a gross fraud on the Banking Department and the State, as well as against those dealing with the banks; that these banks were, and, in respect to this controversy, must be regarded as the banks of the bankrupt, as a private banker; that the assets and property of these banks, now in the hands of their receivers, must

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be decreed to belong to the plaintiffs, as assignees in bankruptcy; and that the depositors in and creditors of these banks must come in and share *pro rata* with all the other general creditors of the bankrupt. This is resisted by the receivers, who insist that the assets in their hands belong to them, as such receivers, and must be disposed of by them, for the benefit of the creditors of such banks, as required by the statutes of the State under which such receivers were appointed. No proceedings, under the bankrupt law of the United States, to obtain an adjudication of bankruptcy, have been taken by or against the Bank of Ontario, or the Bank of Canton, as banking associations.

The making, recording, and filing of the certificates of the organization of the Bank of Ontario, and of the Bank of Canton, and the acts of user under them, must, under the laws of this State, and the decisions of our State Courts, be held to be sufficient to establish the existence of these banks, as corporations, as against the associates and third persons, whatever might be the right of the State, by a direct proceeding, by *quo warranto*, founded upon the frauds alleged, to put an end to their corporate existence. (*Act of April 18th, 1838, §§ 15, 16, 17, and 18, Sess. Laws of New York, of 1838, chap. 260; Buffalo & Alleghany R. R. Co. v. Cary, 26 N. Y., 75; Eaton v. Aspinwall, 19 N. Y., 119; Dayton v. Borst, 7 Bosworth, 115, affirmed, 31 N. Y., 435; Palmer v. Lawrence, 3 Sandford's S. C. R., 161, affirmed, 5 N. Y., 389; Leonardsville Bank v. Willard, 25 N. Y., 574; Robinson v. Bank of Attica, 21 N. Y., 406; Stover v. Flack, 30 N. Y., 64.*) Whatever might be the rights of the creditors of these banks, as against the bankrupt, in consequence of the fraud practiced by the bankrupt, there is no ground of equity upon which the assignees of the bankrupt, (either as his representatives, or as the representatives of his general creditors,) can reach the assets of these banks now in the hands of their receivers.

It was urged by the plaintiffs, that the object of the bankruptcy Act is, to secure an equal, or, rather, *pro rata*, distribu-

tion of all the property of the bankrupt, to and among all his creditors ; but the Act itself (§ 36) recognizes a different rule, as respects the joint and individual property, and joint and individual debts, of members of a copartnership ; and, if there were no legal corporations in existence, and the associates who signed the certificates of organization before referred to were simply copartners, and liable as such, their copartnership property would be distributed among their copartnership creditors, to the exclusion of the separate creditors of an individual member of the copartnership. In short, it is believed that there is no ground upon which the plaintiffs can maintain either a legal or an equitable title to the property sought to be reached by these suits. The fraud imputed to the bankrupt should not give his general creditors any right to the deposits in these banks, as against the persons who made such deposits upon the faith of the legal existence of the corporations, and of their right to look to the assets and property of the corporation as their security ; and it would seem to be inequitable and unjust to enforce the claim made by the assignees in this case.

The view taken of the actual legal and equitable rights of the parties renders it unnecessary to inquire whether the bills in these cases should not be dismissed upon the ground that the rights insisted upon by the plaintiffs, if any such rights exist, are legal rights, in respect to which they have an entirely adequate remedy at law. Nor has it been deemed necessary to discuss the question, whether the laws under which the receivers were appointed are insolvent laws, and, therefore, superseded by the bankruptcy Act ; for, the plaintiffs, in order to succeed in these suits, must show title in themselves to the property in controversy. The receivers, being in possession of the property, are entitled to hold it until it is claimed under a paramount title.

As the decision is against the alleged right of the plaintiffs to the subjects of controversy, it is, also, unnecessary to consider the question raised by the defendants, in regard to the right of the State Courts to decide the questions of prop-

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erty involved, by reason of their having, as it was insisted, obtained jurisdiction, and placed the property in controversy in the possession of their receivers, by proceedings commenced anterior to the commencement of the proceedings in bankruptcy under which the plaintiffs claim.

Upon the whole case, the plaintiffs' bills must be dismissed; but, as the question presented was one upon which it was proper to ask the opinion of the Court, and as the assignees, in filing their bills, acted under the advice of eminent counsel, the bills must be dismissed without costs.

In re THE KEROSENE OIL COMPANY, A BANKRUPT.

K. was adjudged a bankrupt. G., at the time, held a mortgage on some of K.'s property. Afterward G. commenced a suit in the State Court, for the foreclose of the mortgage, making J., the assignee in bankruptcy of K., a defendant. J., on a petition to the District Court, alleging the invalidity of the mortgage, and praying that it might be decreed to be void, and that the mortgaged premises might be sold, and the proceeds be brought into Court, and that further proceedings in the foreclosure suit might be enjoined, obtained such injunction, and an order requiring G. to answer the petition: *Held*, that the District Court had jurisdiction in the case, under § 1 of the Bankruptcy Act of March 2d, 1867, (14 *U. S. Stat. at Large*, 517.)

Held, also, that the proceeding by J. should have been by a formal bill in equity.

The petition of J. was directed to be amended, and to be filed as a bill in equity, and G. was ordered, on service of a copy of it on his attorney, to plead to or answer it, according to the rules and practice of the Court, and proceedings in the foreclosure suit were stayed.

(Before NELSON, J., Eastern District of New York, July 29th, 1869.)

THIS was a petition by the New York Guaranty and Indemnity Company, for the review of an order of the District Court, sitting in bankruptcy. The case was this: The Kerosene Oil Company, a corporation, was adjudged a bankrupt on the 16th of June, 1868, and Charles Jones was appointed its assignee. At that time, the New York Guar-

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anty and Indemnity Company held a mortgage against the bankrupt, which it claimed was a lien on a part of the assets ; and, on the 10th of October following, it commenced a suit, in the Supreme Court of the State of New York, to foreclose said mortgage, making, among others, the assignee in bankruptcy one of the defendants. The amount secured by the mortgage was \$100,000. On the 30th of October, the assignee presented a petition to the District Court, alleging, among other things, the invalidity of the mortgage, and praying that it might be declared to be of none effect, and void, for reasons set forth in the petition ; that the mortgaged premises might be sold, and the proceeds be brought into Court, and disposed of according to the rights of the several parties interested therein ; and that an injunction might be issued out of that Court, enjoining the Guaranty and Indemnity Company, their officers and agents, from taking any further proceedings in the foreclosure suit. This injunction was granted, and the company was required to answer the petition.

Benjamin F. Tracy, for the assignee in bankruptcy.

William Allen Butler, for the Guaranty and Indemnity Company.

NELSON, J. It is claimed, that the District Court had no jurisdiction over the foreclosure suit in the Supreme Court ; that it was error to enjoin the proceedings therein ; and that, if the Court had jurisdiction, the proceeding to restrain the suit, and to adjudicate on the rights of the parties, should have been taken by bill, and not by an informal and summary proceeding.

1. I am inclined to think that the District Court had jurisdiction in the case, under the first section of the Bankruptcy Act, which provides, that the jurisdiction thereby conferred shall extend to all controversies between the bankrupt and any creditor or creditors, and, among other things, "to the ascertainment and liquidation of the liens, and other

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specific claims thereon," that is, ~~on~~ on the assets, and, "to the adjustment of the various priorities and conflicting interests of all parties."

In the present case, the proceedings were instituted in the Supreme Court of the State after the Kerosene Oil Company had been declared a bankrupt, and an assignment of its assets had been made. Whether, or not it would be otherwise as to the jurisdiction, if the suit had been pending in the State Court at the time of the institution of the bankruptcy proceedings, is a question I do not intend to determine in this case.

2. But, I am of opinion that the proceeding by the assignee against the Guaranty and Indemnity Company should have been by bill in equity, and not in this informal and summary way. The 2d section provides, that the Circuit Courts shall have concurrent jurisdiction with the District Courts, of all suits at law or in equity, which may be brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee, touching any property, or rights of property, of the bankrupt, &c., but limits the suits, so that they must be brought within two years from the time the cause of action accrued for, or against, the assignee. The 8th section gives an appeal to the Circuit Court from the decrees of the District Court, in all cases in equity, and a writ of error in cases at law, when the debt or damages claimed amount to more than five hundred dollars. The residue of the section applies principally to the case of a creditor whose claim has been rejected or allowed by the District Court in the course of the bankruptcy proceedings, and has no application to the present case, as the Guaranty and Indemnity Company has not appeared as a creditor therein. The 9th section allows an appeal, or writ of error, from the Circuit Court to the Supreme Court, where the matter in dispute exceeds two thousand dollars.

Now, under the 2d section of the Act, and the concurrent jurisdiction there conferred, this proceeding might have been instituted in the Circuit Court. It is a proceeding by

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the assignee against a person claiming an adverse interest, within the very words of the section; and, it seems to me, that a fair interpretation of them would require the proceeding to be a suit at law, or a bill in equity, as the case might be. If so, I think the proceeding should be the same in the District Court. It is by no means clear, that, under the 8th section, an appeal would lie to the Circuit Court, from a decision of the District Court, in the summary proceedings in the present case.

I shall direct, therefore, that the petition of the assignee to the District Court be amended, and be filed as a bill in equity; that, on serving a copy of the same on the attorney for the Company, it shall plead or answer within and according to the rules and practice of the Court; that all proceedings be stayed, as respects the Company, its officers and agents, in the foreclosure suit in the State Court; and that all orders and proceedings in the case, inconsistent with this order, be vacated and set aside.

THOMAS FIELDEN AND WILLIAM C. PICKERSGILL, SUR-
VIVORS, &C.

vs.

LOUIS ÉMILE LAHENS, AND THE EXECUTORS OF JOHN
LAFARGE, DECEASED. IN EQUITY.

Equity will not hold a surety liable, when he is discharged at law.

In the case of an obligation joint, and not joint and several, executed by a principal and a surety, and the death of the surety, the remedy at law is gone, as against the legal representatives of the surety.

No State statute, enacted after the making of such an obligation, can change the contract of the surety, to his prejudice.

(Before NELSON, J., Southern District of New York, July 31st, 1869.)

THIS case came up on a demurrer to a bill filed against the

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defendant Lahens, and the representatives of John Lafarge, deceased, to enforce the collection of the amount payable by the condition of a bond executed by Lahens and Lafarge, on the issuing, in a State Court, of an injunction to stay the proceedings in a suit at law pending in such Court. The bond was joint, and not joint and several. Lafarge was only a surety, and was in no way interested in the proceedings in the State Court. The bond was dated April 25th, 1846, and was conditioned to pay to the firm of Fielden Brothers, & Co., (of whom the plaintiffs were the survivors,) all moneys which might be recovered by them in such suit at law, or the collection of which might be stayed by such injunction. A judgment was recovered by the plaintiffs in the suit at law, for \$129,429.52, and the suit in which the injunction was issued was dismissed. Lafarge died, and Lahens, who was a defendant in the suit at law, was insolvent when the judgment was recovered, and had petitioned for a discharge under the bankruptcy Act of the United States. Lafarge left assets sufficient to satisfy the judgment. The demurrer was interposed by the representatives of Lafarge.

William W. McFarland, for the plaintiffs.

Charles O'Conor, for the defendants.

NELSON, J. This case is an important one, on account of the large amount involved, and the certainty that, unless it shall be recovered out of the assets of the estate of Lafarge, it will be lost. But, in my view of it, the principles that must govern it are not new or difficult. One branch of it falls directly within the doctrine of the case of *United States v. Price*, (9 How, 83, 90 to 95, and the cases there referred to.) The principle is, that equity will not hold a surety liable, when he is discharged at law; and that, in the case of a joint obligation, and of the death of the surety, as in the present case, the remedy at law is gone, as it respects the legal representatives of the surety. The cases on this subject are

numerous, and it would be useless to discuss them. Several of them will be found referred to in the opinion of the Court in the case of *United States v. Price*, and many more in the dissenting opinion of Mr. Justice Woodbury in that case (*pp.* 96 to 108).

It is urged, that certain provisions in the Code of Procedure of the State of New York have had the effect to change this rule, and to furnish a remedy at law against the representatives of a deceased joint obligor. That Code provides, in substance, that, in a suit upon a joint contract against defendants, a judgment may be rendered against any or either of them, severally, (§§ 136, 274.) These provisions were enacted after the date of the bond in question, and, if then operative and effectual to change the contract made by Lafarge, they must be disregarded, as the Legislature possessed no such power. I agree, that if this bond had been joint and several, a suit at law might have been sustained against the representatives of Lafarge, and his estate would have been bound to pay the judgment and as, in such case, a joint suit could not have been maintained, at law, against the surviving obligor and the representatives of the deceased obligor, equity would have afforded relief. (*See cases in dissenting opinion of Woodbury, J., above referred to, pp.* 96 to 98.) So, also, if the Code has the effect of converting this bond into a joint and several bond, and the Legislature was competent to make the change, this suit is well brought, and should be sustained. But, as at present advised, I am of opinion that the provisions of the Code have no such effect; and, what is more important, if they purported to have such effect, they could not be upheld, on the ground that they would change a material part of the contract, to the prejudice of the surety. Lafarge, the obligor, did not agree to become severally bound, but jointly; and this distinction is so material, that bills are not unfrequently filed, and suits sustained or defeated, after a serious litigation to ascertain whether the bond, or other contract, was joint, or joint and several.

In any view, therefore, the demurrer must be sustained.

The Delaware.

THE DELAWARE.

An allowance for salvage services, made in this case by the District Court, depending upon the exercise of sound discretion, was not interfered with by this Court.

It was not error in the District Court, not to charge the cargo of a vessel libelled for salvage, with a portion of the amount allowed for salvage, where no such point was taken in the answer, the owners of the vessel being responsible for her seaworthiness, and the disaster which made the salvage necessary having occurred through her unseaworthiness.

(Before NELSON, J., Southern District of New York, August 5th, 1869.)

This was a libel *in rem*, filed in the District Court, to recover damage for rescuing the steamship Delaware from impending peril, while lying off South Edisto Island, South Carolina. The steamship Perit, belonging to the libellants, was on a voyage from New York to Savannah, and, discovering the Delaware blowing off steam, and with a flag of distress set, ran down to her, and ascertained that her boiler had given way, and, at the request of her master, attached a hawser to her and towed her to Savannah.

The District Court allowed to the master and crew of the Perit \$2,500 for salvage services. The claimant appealed to this Court.

Charles Donohue, for the libellants..

Warren Hardenbergh, for the claimant.

NELSON, J. As the allowance made in this case depends, as to the amount, upon the exercise of sound discretion, I am not inclined to interfere with it.

A point is made, that the Court erred in not charging the cargo with its portion of the amount allowed. No such point is made in the answer; and, besides, the owners of the Dela-

The D. S. Gregory.

ware were responsible for her seaworthiness, for the want of which the disaster occurred.

Decree below affirmed.

THE D. S. GREGORY.

Where a steamship came in from sea and anchored, in a thick fog, in the Hudson river, between the city of New York and Jersey City, about in the usual track of the ferry-boats running on a ferry between the two cities, and one of the ferry-boats, in one of her trips, passed under the stern of the steamship and saw her just as she was dropping her anchor, and afterward, during the same fog, the same ferry-boat collided with the steamship, so at anchor: *Held*, that the ferry-boat was in fault.

Held, also, that the steamship was not in fault, in anchoring where she did.

(Before NELSON, J., Southern District of New York, August 7th, 1869.)

THIS was a libel, *in rem*, filed in the District Court, against the steam ferry-boat D. S. Gregory, by the owners of the steamship Talisman, to recover for the damages sustained by the latter, in a collision which occurred between the two vessels, in the port of New York, on the morning of the 15th of January, 1863, about half-past nine o'clock. The District Court decreed for the libellants, and the claimants appealed to this Court.

Daniel D. Lord, for the libellants.

Edgar S. Van Winkle, for the claimants.

NELSON, J. The D. S. Gregory was one of the ferry-boats running from the foot of Montgomery street, in Jersey City, across the Hudson river, to the foot of Courtlandt street, in New York. The Talisman came into the port on the afternoon of the 14th of January, and anchored in the river, about in the usual track of the ferry-boats running between the two points above mentioned. When she arrived, there was a thick

The D. S. Gregory.

fog, and the river was full of vessels at anchor and moving, so that some difficulty was experienced in finding an open space sufficiently large to anchor her without her being in dangerous proximity to other vessels. The D. S. Gregory, in one of her trips, passed under the stern of the *Talisman*, and saw her just as she was dropping her anchor, on her arrival in the river. The fog continued through the night and the next morning, so that it was difficult to see a vessel at a distance of a ship's length ahead. The D. S. Gregory, on one of her trips from the New Jersey side to the New York side; struck the *Talisman* about amidships, on her port side, head on, doing considerable damage. The Court below found the ferry-boat in fault, upon the facts; and, after the best examination I have been able to give to the case, I am inclined to concur in that view.

The main and strongest argument against this conclusion is, that the *Talisman* was in fault, in anchoring in the usual track of these ferry-boats. She was in charge of a New York pilot at the time, who, of course, well knew their usual track; and, if I could agree that there was fault in anchoring a vessel there, I should have but little difficulty in coming to a different conclusion. But I am not willing to establish, as a rule of navigation in that part of the river, that vessels arriving must take care to anchor outside the line of any and all of the ferries crossing it at that place. There are some seven of them, within a comparatively short distance from each other; and it is apparent, that, to lay down any such rule, would seriously interfere with navigation and commerce upon that river. The tracks of these ferries, regarding winds and tides, are of no inconsiderable width, and would, in the aggregate, occupy a very large portion of the river, which would be forbidden to the accommodation of vessels engaged in foreign or domestic commerce. I must hold, therefore, that the *Talisman* was not in fault in taking the position she did in the river, especially under the circumstances in which she found herself on her arrival. It was the duty of the D. S. Gregory to take every reasonable precaution in her power to avoid the *Talisman*. In this, I think, she failed. She knew that the

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Talisman was anchored in her track the afternoon or evening before; and, as the Talisman did not change her position down to the time of the collision, and the ferry-boat was passing her every trip she was making, the ferry-boat is chargeable with notice of her position, and should have been so navigated as to avoid her.

Decree below affirmed.

THE UNITED STATES vs. GEORGE GORHAM.

Under the Act of February 26th, 1853, (10 *U. S. Stat. at Large*, 166,) moneys paid by the clerk of a District Court, during his clerkship, for expenses incurred by him, as clerk, for board and lodging at hotels, while attending, as clerk, at terms of the Court held away from the place where he is required to keep his office, are not allowable to him as "necessary expenses of his office."

(Before NELSON, J., Northern District of New York, August 11th, 1869.)

THIS suit was commenced in the District Court, and was removed into this Court under the provisions of the Act of March 3d, 1821, (3 *U. S. Stat. at Large*, 643,) on the ground that the Judge of that Court was so related to or connected with the defendant, as to make it improper for him to sit on the trial of the suit. The defendant was the clerk of the District Court, from June, 1861, to January, 1867. He was required to reside at Buffalo and keep his office there. The terms of the Court were held at Albany, Utica, Auburn, Rochester, and Buffalo, and the clerk was required to attend at those terms. During his clerkship, the defendant paid out \$577.25, for expenses incurred by him as such clerk, for board and lodging at hotels, while attending at terms of the Court held away from Buffalo. In accounting to the Government for the moneys received by him, as clerk, in excess of his maximum allowance, he withheld the \$577.25. The Government, in adjusting his account for services, as clerk, withheld

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\$265.61 due to him for such services, and claimed that the defendant, as clerk, still owed to it \$311.64. Under the Act of January 25th, 1828, (4 *U. S. Stat. at Large*, 246,) the Government withheld from the defendant the sum of \$311.64, due to him for services rendered to the Government as a United States Commissioner. This suit was brought at the request of the defendant, made before he knew of the withholding by the Government of the \$311.64. The object of the suit was to recover the \$311.64 claimed by the Government to be due from the defendant, as clerk, and to determine the question, whether the defendant, as clerk, was entitled to be allowed that amount, so paid by him for board and lodging, as being "necessary expenses of his office" within the meaning of the Act of February 26th, 1853, (10 *U. S. Stat. at Large*, 166.) The case was tried before the Court, without a jury.

William Dorshemer (*District Attorney*), for the plaintiffs.

George Gorham, defendant, in person.

The Court (NELSON, J.) held, that the expenses in question were not allowable, and directed a judgment to be entered for the plaintiffs.

JAMES DRAKE AND OTHERS

vs.

FRANCIS GOODRIDGE AND OTHERS. IN EQUITY.

Where real estate was sold at auction by a receiver, and the purchaser refused to complete the purchase, on account of an alleged defect of title, and the Court made an order directing him to perfect the purchase, and the receiver then gave notice of the withdrawal of such order, and consented that it should be held void: *Held*, that the purchaser was entitled to be paid by the receiver.

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er his legal expenses, including reasonable counsel fees, incurred and paid in searching and examining the title, and in resisting the proceedings to have the purchase perfected.

(Before NELSON, J., Southern District of New York, August 11th, 1869.)

A RECEIVER, in this case, sold at auction, under an order of the Court, certain real estate in the city of New York, which was purchased at the sum of \$191,000, by parties who paid down ten *per cent.* of the purchase-money, (\$19,100,) besides \$60 for auctioneer's fees. The purchasers refused to perfect the purchase on account of an alleged defect of title, but were ordered by the Court to perfect it. From this order an appeal to the Supreme Court was about to be taken, when the attorneys for the receiver gave notice of the withdrawal of the order compelling the purchasers to fulfil the purchase, and consented that such order should be held void and of no effect. On these facts, the purchasers now presented a petition, praying for a return of the purchase-money so paid, with interest, together with the legal expenses, including reasonable counsel fees, incurred and paid in the course of their proceedings in making the purchase.

Charles O'Conor, for the petitioners.

Clarence A. Seward, for the receiver.

NELSON, J. I perceive no valid objections to the claim, and refer the case to the clerk to ascertain, over and beyond the purchase-money paid, and the interest thereon, the amount of the legal expenses and reasonable counsel fees in searching and examining the title, and, also, in resisting the proceeding to have the purchase perfected.

The Onrust.

THE. ONRUST.

Where, by a charter-party, the owner of a vessel agreed that she should proceed direct from the Tortugas, whither she was bound, to another port, to load under the charter, and, after arriving at the Tortugas, she was seized by the military authorities of Fort Jefferson, and compelled to go on two voyages to Key West, for cargoes of coal, which it was alleged was necessary to be used in condensing fresh water for the use of the post, and the seizure was against the protest of the master of the vessel, and without any fault on his part: *Held*, in a suit against the vessel, on the charter-party, to recover damages for its breach and for the delay, that the military authorities were justified in impressing the vessel.

If they had erred, and their error had been simply an error of judgment, on the facts as they appeared to them, they would still be justified.

The word "direct," in the charter-party, means that the vessel is to take a direct course from the Tortugas to the loading port, without deviation or unreasonable delay, and not that she shall depart from the Tortugas immediately.

The duty to perform the agreement to proceed direct from the Tortugas to the loading port, was an obligation imposed by law.

A forcible detention will excuse from the performance of an obligation created by law.

The case of *Paradine v. Jane*, (*Alley's R.*, 27,) commented on.

The seizure of the vessel being justified, and her owner having been disabled from performing his contract without any fault on his part, the fact that he has a remedy over against the Government does not make him responsible to the charterer for the delay.

In this case, he is not responsible for such delay, even though the military authorities were trespassers in seizing and detaining the vessel.

(Before NELSON, J., Southern District of New York, August 14th, 1869.)

THIS was a libel *in rem*, in the District Court, against the schooner Onrust, to recover damages on a charter-party, by which the owner of the schooner chartered his vessel for a voyage from a place, or places, designated, in the State of Florida, to the port of New York, with a cargo of cedar. The charter-party, which was dated December 14th, 1865, contained this language: "It is understood, that the vessel is now loading for Key West, or the Tortugas, and is to proceed

The Onrust.

thence direct, to load on this charter." The vessel reached Fort Jefferson, at the Tortugas, January 15th, 1866, and discharged her cargo, and was ready to start for the port in Florida, as required by the charter, when she was seized by the authorities of the Fort, and compelled to go on two voyages to Key West for cargoes of coal, for the alleged necessities of the place. The allegation was that the officers and soldiers in the Fort depended upon coal to condense water for the post. The District Court decreed for the claimant and the libellant, appealed to this Court.

George De Forest Lord, for the libellant.

Robert D. Benedict, for the claimant.

NELSON, J. There is no doubt that the vessel was impressed by the authorities, for the voyages to Key West, against the will and protest of the master, and without any fault on his part; and that, while thus engaged, she was under the control of the public authorities. This detention occasioned the delay complained of in the libel as an infraction of the charter-party.

In *Mitchell v. Harmony*, (13 How., 115, 134,) Chief Justice Taney says: "There are, without doubt, occasions in which private property may lawfully be taken possession of or destroyed, to prevent it from falling into the hands of the public enemy; and, also, where a military officer, charged with a particular duty, may impress private property into the public service, or take it for public use. Unquestionably, in such cases, the Government is bound to make full compensation to the owner; but the officer is not a trespasser." He admits that, in all such cases, the danger must be immediate and impending, or the necessity urgent for the public service, and such as will not admit of delay. In that case, the Court held, upon the testimony, which was undisputed, that, a case of danger or necessity, within the rule of law, had not been made out, and sustained the judgment for the plaintiff. The Chief Jus-

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tice further observes, that, in deciding upon the necessity, "the state of the facts, as they appeared to the officer at the time he acted, must govern the decision ; for, he must necessarily act upon the information of others, as well as his own observation ; and if, with such information as he had a right to rely upon, there is reasonable ground for believing that the peril is immediate and menacing, or the necessity urgent, he is justified in acting upon it, and the discovery afterwards that it was false or erroneous, will not make him a trespasser." Within this principle, I am inclined to think, that, in the case now before us, the authorities at Fort Jefferson were justified in impressing the vessel for the purposes and uses alleged. Something is due to the decision, made by these officers under the circumstances and relative situation and condition of the Fort—remote from any supply of fresh water for the garrison, and dependent upon the article of coal, as a necessary material in obtaining it. The officers may have erred, but, if their error was simply an error of judgment, on the facts as they appeared to them, they will still be justified.

It is argued, however, that, assuming this to be so, it constitutes no defence against delay in the voyage, in this case, as the carrier had expressly agreed in the charter-party, that he would proceed directly from the Tortugas, on discharging his cargo, to the port or ports of loading in Florida ; and that, as he thus, in terms, covenanted to proceed directly, and without any delay, this forcible detention will not excuse him, within the rule laid down in *Paradine v. Jane*, (*Alleyn's R.*, 27,) and that class of cases. In other words, it is claimed, that, if a party charge himself with an obligation possible to be performed, he must make it good, unless its performance is rendered impossible by the act of God, the law, or the other party. The law, however, is otherwise, if the obligation or duty is created by law.

It is supposed, by the counsel for the libellant, that, by the clause in the charter-party to which I have referred, there is an express and positive obligation entered into by the carrier, to proceed at once from the Tortugas, on unloading his out-

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ward cargo, to the port or ports in Florida, and that the only excuse for delay is to be found in the instances given in the case of *Paradine v. Jane*. I am of opinion that this is too narrow and strained a construction of the word "direct," in the connection in which it is found; and that a plainer and more natural interpretation is, that that word is used to express, simply, the course of the voyage to be performed by the vessel, after arriving at the Tortugas. She was to go direct, that is, she was to take a direct course thence, to the port or ports in Florida, without deviation or unreasonable delay. Giving to the word this interpretation, the duty to perform the covenant with diligence, and in a reasonable time, was an obligation imposed by law, as contradistinguished from one imposed by positive contract. It did not mean that the vessel should depart from the Tortugas instantly or immediately, but that she should, at that place, enter upon the voyage provided for in the charter, and proceed in a direct course to the place of loading in Florida. The degree of diligence and despatch, according to this interpretation, is a question of law, under the particular circumstances of the case.

It is insisted, however, that, admitting that the officers at the Fort were justified in seizing the vessel, and that the party was disabled from performing his contract without any fault on his part, still, as he has a remedy over against the Government, he is not exempt from responsibility for the delay. The answer is, that the remedy over is, within the contemplation of the rule in *Paradine v. Jane*, a legal remedy, which may be enforced in a Court of justice.

Upon the interpretation thus given to the contract, the defence here is complete, even assuming that the officers of the Fort were trespassers in seizing and detaining the vessel. (*Harmony v. Bingham*, 2 Kern., 99; *Parsons v. Hardy*, 14 Wend., 215; *Wibert v. N. Y. & Erie R. R. Co.*, 19 Barb. S. C. R., 36, and 2 Kern., 245; *Conger v. Hudson River R. R. Co.*, 6 Duer, 375.)

Decree affirmed.

JOSEPH CURTIS, TRUSTEE, &c.

vs.

HASKELL G. SMITH, ADMINISTRATOR, &c., OF CICERO COLLINS,
DECEASED.

An unexecuted trust, created by a will, for the use and benefit of H., and, in the event of his death, during his minority, for the use and absolute enjoyment of the heirs of N., is a unit, and cannot be separated into distinct trusts, nor can its administration properly be divided.

The trustee of such a trust must take the trust property encumbered with the whole trust.

It being one of the terms of such trust, that such portion of the estate as may be necessary shall be expended in the education and support of H., a Court of equity will not permit H. to be deprived of a proper allowance for maintenance and education, in order to enhance the contingent estate for the benefit of the heirs of N.; nor will it permit the property to be wasted one H., without regard to the contingent rights of the heirs of N.

The administrator of a deceased trustee of such trust is not liable, in this Court, to be sued in a suit at law, by the successor of such deceased trustee, to recover the trust fund, but can be called to account for such fund only in a suit in equity.

A person who is not appointed trustee under such will, but is only empowered to carry into effect its trust, so far as relates to H., has no right to the custody of the trust fund.

In an action at law, this Court is governed by the laws in force in Connecticut, when those laws relate to the substantial rights of the parties, and not to mere matters of practice.

It is the law of Connecticut, that a guardian must be constituted such by an appointment made in Connecticut, before he can bring an action in a Court in Connecticut, to recover property claimed by him as guardian.

The Statute of Connecticut, passed in 1854, (*General Statutes of Conn.*, 1866, 316, 317,) does not confer on a foreign guardian the right to sue in Connecticut, either at law or in equity.

Seemle, that, where the legal title of a trustee is created by the owner of property, the right of the trustee to enforce it will be recognized every where; but, where such title is derived solely from some act of the law, the effect of that act is confined to the territorial jurisdiction over which the law extends.

Whenever a trustee of the latter description seeks to exercise his powers in another State than that under whose laws he was appointed, he must first have his appointment repeated by the local tribunal having jurisdiction over the appointment of trustees.

A trustee of the former description, where the trust is created by a will, must, whether he be appointed trustee by the will or otherwise, prove the will in the local jurisdiction where the trust fund is in the hands of a person from whom he seeks to recover it, before he can maintain a suit against such person therefor.

(Before SHIPMAN, J., Connecticut, August 24th, 1869.)

▲ THIS was an action at law, for an account, tried before the Court, without a jury.

Daniel B. Beach, for the plaintiff.

Origen S. Seymour, for the defendant.

SHIPMAN, J. On the 8th of June, 1860, Alida M. Benson, of Chicago, Illinois, died, leaving a last will and testament, which, among other things not necessary to mention here, contained the following clauses: "My pianoforte and silver I give and bequeath to my nephew, Homer Collins, son of Nelson Collins, and I direct that the care and custody thereof during the minority of said Homer, be given to his father. All the rest and residue of my property, consisting of bonds, promissory notes, and debts due and owing to me, and all securities by way of mortgage or otherwise, given for the payment thereof, I hereby give and bequeath, subject to the payment of my just debts, and the charges and legacies hereinbefore named, to my brother, Nelson Collins, in trust, nevertheless, for the following uses and purposes, that is to say: That my said brother shall collect the same, and invest the proceeds arising from such collections, for the sole use and benefit of my said nephew, Homer Collins, for and during his minority, and, when he shall attain the age of twenty-one years, then that he give said proceeds, with all the increase thereof, to the said Homer absolutely; but, in case the said Homer shall die during his minority, leaving any brother or sister him surviving, then, and in that case, the said proceeds, with all their increase, over and above what shall have been expended for

and on account of said Homer, to be held after his decease for the use and benefit of the remaining child or children of the said Nelson; for and during their minority, and to be divided between them, share and share alike, as they shall respectively attain the age of twenty-one years; but, in the event of the decease of the said Homer during his said minority, leaving no brother or sister him surviving, or, in the event of the decease of the remaining child or children of the said Nelson during their minority, then, upon the decease of the said Homer, in the one case, and the decease of the remaining child or children, in the other case, said proceeds then remaining, with all their increase, to go to such person as said Nelson shall in writing appoint, to be held by such person for the sole use, benefit and enjoyment of said Nelson for and during his life, and to be used, managed, controlled and disposed of in such way or manner as he, the said Nelson, shall direct, and, in the event that any portion thereof shall remain at the time of his decease, the portion then remaining to go to such person or persons, use or uses, as he, the said Nelson, shall, in and by his last will and testament, appoint, and, in default of such appointment, then to the heirs of said Nelson." The testatrix appointed Seth Wadhams to be her executor. The will was duly probated in the county Court for the county of Cook, Illinois, and the estate of the deceased was there settled. Nelson Collins, to whom the above bequest was made in trust, died, at sea, on the 18th of January, 1861, his wife, the mother of Homer, having died previously. The domicil of Homer Collins, the *cestui que trust* named in the will, has always been and now is in the State of New York. On the 23d of April, 1861, Cicero Collins, then of the city of New York, was, by the Supreme Court of that State, appointed "trustee, in place of Nelson Collins, deceased, and directed and fully empowered to execute the trust in and by said will directed in favor of said Homer Collins." Homer Collins was then, and is still, an infant, under the age of twenty-one years. Cicero Collins accepted the appointment of trustee, and, on the 22d of May, 1861, duly filed his bond for the faithful per-

formance of the trust. On the 5th of October, 1861, he received from Wadhams, the executor of the will, the property bequeathed in the clauses of the will above cited, and gave his receipt therefor. He subsequently converted the same into money, amounting to several thousand dollars, and held the avails thereof in his hands at the time of his death, which took place at Litchfield, Connecticut, which place was then his domicil, in 1866. The Court of Probate for the district of Litchfield, having jurisdiction of the settlement of the estate of Cicero Collins, appointed Haskell G. Smith, the defendant, administrator thereon, which trust he accepted, and gave bonds for its performance. Nelson Collins left no children other than Homer, the one named in the will, and left no will. On the 24th of February, 1868, the Supreme Court of the State of New York, at a special term held at Rochester, the domicil of Homer Collins, appointed the plaintiff "trustee under the will of the said Alida M. Benson, to execute and carry into effect the same, so far as it relates to the infant Homer Collins." The trustee accepted the appointment, and gave bonds. He has now instituted the present suit against the defendant, as administrator of Cicero Collins, the former trustee. It is an action at law, for an account, and the declaration alleges, that Cicero Collins, in his lifetime, as bailiff and receiver of the minor Homer Collins, received from Wadhams, the executor of Alida M. Benson, eight thousand dollars, and from other sources two thousand dollars. It is conceded, that whatever property or funds Cicero Collins received, came, in some form, from the estate of Alida M. Benson, and under her will, as above cited.

The defendant has pleaded the general issue, and also set up several specific grounds of defence: (1.) That the Supreme Court of New York had no jurisdiction to appoint the plaintiff trustee, as set forth in the declaration; (2.) That, whatever appointment the plaintiff in fact received from the Supreme Court of New York, that appointment conferred upon him no power to act within the limits of the State of Connecticut, or bring this suit in this Court; (3.) That, whatever may have been the relations existing between Cicero

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Collins and the minor, the former was never trustee of the estate of the latter, nor bailiff or receiver of any part of his estate, or liable to be sued in an action of account; (4.) That the defendant, as administrator of Cicero Collins, deceased, is not liable to be sued in an action of account by the minor, or any one in his behalf. These four points are set up by notice, under the general issue, according to the modern practice of the State Courts in Connecticut, and, as no objections have been raised to this form of presenting the questions in this Court, all such objections are deemed to have been waived by the plaintiff, and the Court, for the purposes of this case, takes the questions as if more formally pleaded.

The will, after the bequest of the pianoforte and silver to Homer Collins, already cited, makes certain other devises and bequests, which need not be noticed in this case. Then follows the residuary clause, above cited, giving to Nelson Collins the property in question, in trust for the uses set forth. Both Nelson Collins and his wife, the parents of Homer Collins, being dead, leaving no issue except Homer, the scope of the trust created by the will is narrowed. In case of Homer's death before attaining his majority, a contingency provided for in the will, he can leave no brother or sister. Nelson being dead, the contingency upon which he was to appoint a trustee to hold the property for his use and benefit, can never occur. He left no will making any appointment touching the trust property. Whether he had the power to make such an appointment by will, previous to the death of Homer, need not be determined. All the provisions of the trust have, therefore, fallen, except those which relate to the interests of Homer Collins and of the heirs of Nelson Collins. The trust, then, created by the will, as it now stands, is, first, for the benefit of Homer, and, second, in the event of his death, before his majority, for the benefit of the heirs of Nelson Collins. It is quite possible that the heirs of Nelson Collins, and those of Homer, may be identical; but it is not necessary to decide this question. If they be identical, that fact has no importance in relation to this property, for, upon the death

of Homer, during his minority, the property must go, under the will, "to the heirs of said Nelson." The fact, if it be so, that the heirs of Nelson and Homer are identical, would make no difference. If they take by the happening of the contingency upon which their right is suspended, they take as a description of persons under the will, and not by descent from either Nelson or Homer. This is, therefore, an unexecuted trust, for the use and benefit of Homer Collins, and, in the event of his death, during his minority, for the use and absolute enjoyment of the "heirs of Nelson Collins." Such a trust is a unit, and cannot be separated into distinct and several trusts, nor can its administration properly be divided. The trustee, when properly appointed, must take the property encumbered with the whole trust, and be held accountable to the heirs of Nelson Collins, as well as to the primary *cestui que trust*, Homer. The trust continues till the latter arrives at the age of twenty-one years, if he shall live so long, when it must terminate by the payment of the estate over to him. If he should die during his minority, then the trust must terminate at his death, by the payment of the same over to the heirs of Nelson.

From the language of the will creating the trust, it is evident that the testatrix intended that such portion of the income (and perhaps such portion of the principal) as might be necessary, should be expended in the education and support of Homer. For an equitable administration of the trust in this particular, the trustee would be accountable both to the minor and to the heirs of Nelson, and his expenditures therein would be under the control of the proper tribunal, on the application of either of these parties. A Court of Chancery would not permit Homer to be deprived of a proper allowance for maintenance and education, by the niggardly parsimony of a trustee, in order to enhance the contingent estate for the possible benefit of the heirs of Nelson. On the other hand, it would not permit the property to be improperly lavished on the primary *cestui que trust*, without regard to the contingent rights of those heirs.

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This being, then, an indivisible, open and unexecuted trust, the question arises, whether the administrator of the deceased trustee is liable to a suit at law for the trust fund. The question can be easily answered. The authorities are uniform and decisive on the point. In *Barings v. Willing*, (4 Wash. C. C. R., 248, 250,) Mr. Justice Washington remarks: "Courts of equity have always claimed and exercised exclusive jurisdiction in cases of trusts, and over the conduct of those appointed to execute them. This has never been disputed ground. No other tribunal can so properly direct the manner of executing them, or inquire into and correct abuses, where there has been, or is likely to be, mismanagement by the trustees. No other Court can so conveniently provide against those unforeseen casualties which may defeat the will of the party who created the trust. It would be a reproach upon the administration of justice, if a Court of equity did not possess these powers, since it must be admitted, on all hands, that they cannot be exercised by the Courts of common law." (See, also, 2 *Swift's Digest*, 117; 2 *Story's Eq. Juris.*, § 1058; *Adams' Eq.*, pp. 26, 27.) This is the general doctrine and has been uniformly adhered to. As is remarked by Nelson, Ch. J., in *Dias v. Brunell's Ex'r*, (24 Wend., 9, 13 :) "It cannot be necessary for Courts of law, at this day, to repudiate any such jurisdiction; they never possessed it, and are sufficiently burthened with their own legitimate duties, if no other considerations influenced them, not to desire a most inconvenient enlargement, by usurping the peculiar province of another forum. 5 *Vesey*, 581; *Willis on Trusts*, 7, 8, and note k, and 16; *Lewellin on Trusts*, 20; 2 *Hall's R.*, 130."

Had the present suit been brought against Cicero Collins during his lifetime, he could, beyond all doubt, have effectually interposed this objection to the jurisdiction of this Court, as a Court of law. He was liable to be called to account only in a Court of equity. Now, I apprehend that the administrator of the deceased trustee stands, in this particular, in the same position as his intestate stood. He took the estate, not as administrator, but as trustee for the time being.

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(*Tiffany & Bullard on Trusts & Trustees*, 325, 326.) The fund does not belong to the estate of the deceased, and is not assets in the hands of his administrator. It is not to be applied for the benefit of the creditors or distributees of Cicero Collins' estate, but is to be held, protected and disposed of in accordance with the directions in the will. (*Dias v. Brunell's Ex'r*, 24 Wend., 9, 13).

It must be remarked, that there is no claim or evidence of any express promise by Cicero Collins, or by his administrator, to pay over any portion of this trust fund, and, if there had been, it may well be doubted, whether a Court of law would be justified in holding such a promise a sufficient foundation for an action at law. Such a proceeding against a trustee is only allowable where he has some distinct, separate and ascertained balance in his hands, to which some particular party is entitled, and which the trustee has expressly promised to pay. In such a case, a suit at law will lie against the trustee individually. (*Dias v. Brunell's Ex'r*, 24 Wend., 9, 13.)

But there is another very serious difficulty in this case—one which exemplifies the mischief and impracticability of attempting to deal with such a trust as this in a Court of law. As I have already shown, this is an indivisible trust, created by will, and, though now narrowed in its scope, by the death of an intermediate party, it is a trust to be held and executed for the benefit of Homer Collins, in such a manner as to protect the contingent rights of the heirs of Nelson Collins. Now, the plaintiff in this case was not appointed to execute this trust. His appointment purports to authorize him only to “execute and carry into effect the same, so far as it relates to the infant Homer Collins.” Surely, it requires neither argument nor authority to prove, that the trust created by this will cannot be parcelled out in this way, and the whole fund be vested, by a judgment at law, in a person who at most is authorized to act only in behalf of one branch of the trust and of one of the parties thereto. Even a Court of equity would not be justified in directing this fund to be delivered to a trustee clothed only with these limited powers, and subject only to such limited responsibilities.

It follows, from these views, that this trust fund cannot be recovered in this action at law. (1.) The defendant, as representing the deceased trustee, is liable to account only in equity. The administration of the fund by the deceased should pass under the review of a Court of equity, where his account can be properly settled and stated, so that, if there has been any diminution of the fund through his mal-administration, it can be clearly ascertained, and the trust estate be put in the way of being reimbursed out of the sureties of the deceased trustee, or out of the assets in the hands of his administrator. (2.) The action at law must fail, because the appointment of the plaintiff is not that of trustee under the will, empowered to execute the trust therein created, but only to carry into effect the same, so far as it relates to the infant, Homer Collins. Such an appointment alone confers no right to the custody of this trust fund.

It has not escaped my attention that the pianoforte and silver, given by the will, are no part of the trust property. If they have been sold, the avails form no part of the trust funds. They were specifically given by the will to Homer. His father was merely to have the care and custody of the articles during the minority of his son. The latter took them by an indefeasible title, and, at his death, they go to his heirs, and are in no way embraced in this trust into which the residuary estate was thrown. As the father, to whose care and custody they were committed by the will, during the minority of the legatee, is dead, their custody now belongs to his guardian. But the plaintiff does not sue in this case, at least in form, as his guardian. If, however, his appointment by the Supreme Court of New York could be construed as clothing him with the rights, powers and character of guardian, he could not be permitted to maintain this action, even for the avails of this pianoforte and silver, for the obvious reason that he has not taken out letters of guardianship in this State.

In actions at law, this Court is governed by the laws in force in this State, when those laws relate to the substantial rights of the parties, and not to mere matters of practice.

Now, it is the settled law of this State, as well as of all, or nearly all, other States and countries, that foreign guardians cannot maintain suits beyond the territory in which they were appointed. Mr. Justice Story, in his *Conflict of Laws*, (§ 504 a,) remarks, after having stated the rule in regard to immovable property: "The same rule is applied, by the common law, to movable property, and has been fully recognized both in England and in America. No foreign guardian can, *virtute officii*, exercise any rights, or powers, or functions over the movable property of his ward, which is situated in a different State or country from that in which he has obtained his letter of guardianship. But he must obtain new letters of guardianship from the local tribunals authorized to grant the same, before he can exercise any rights, powers, or functions over the same. Few decisions upon the point are to be found in the English or American authorities, probably because the principle has always been taken to be unquestionable, founded upon the close analogy of the case of foreign executors and administrators." In a learned note to *Andrews v. Herriot*, (4 Cowen, 529,) the reporter says: "But persons coming *en autre droit*, under the appointment of foreign laws, cannot be parties. To entitle them to be received as such, they must have their appointments repeated under our laws." The precise point was directly decided by Chancellor Kent, in *Morrell v. Dickey*, (1 Johns. Ch. R., 153.) He held, in that case, that a mother duly appointed by the Orphans' Court in Philadelphia was not entitled to receive a legacy due to her infant son, from an administrator in New York. The Chancellor remarked: "It is only in her character of guardian duly appointed here, upon requisite security, that she can entitle herself to receive the legacy of her son." As intimated by Mr. Justice Story, this doctrine has undoubtedly been regarded as resting upon the same principle as that which holds foreign executors and administrators under a disability to sue until they have received authority from the local tribunals authorized to grant the same. This was evidently the view of Chancellor Kent, in *Morrell v. Dickey*, and of Judge

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Cowen, in his note to *Andrews v. Herriot*; for, the cases they cite in support of the position they take, are all, or nearly all, those which relate to the rights and powers of foreign executors and administrators. The doctrine, so far as it relates to executors and administrators, has repeatedly received the sanction of the Supreme Court of Errors of Connecticut, and once, at least, of the Circuit Court of the United States for this district. (*Hobart v. Conn. Turnpike Co.*, 15 Conn., 145; *Riley v. Riley*, 3 Day, 74; *Champlin v. Tilley*, *Id.*, 303.)

This rule of law, touching the disability of foreign guardians, executors, &c., which has prevailed in Connecticut in common with other States, has never been abrogated. It has, however, been slightly modified by statute, but not to the extent of conferring the right to sue, either at law or in equity. By an Act passed in 1854, (*General Stat. of Conn.*, 1866, 316, 317,) it was provided as follows: "Sect. 87. Whenever any executor, administrator, guardian or trustee, shall hold in his hands the personal estate belonging to any heir, legatee, or ward, under the age of twenty-one years, who is an inhabitant of another of the United States, and residing therein, such personal estate may be transferred and delivered to the legal guardian or trustee of such minor, appointed under the authority of the State where such minor resides, and having, by the laws of the State where appointed, power and authority to control the property of his ward. Sect. 88. Whenever such guardian or trustee shall be desirous to receive such property, he may file his application in the Probate Court where the will was proved, administration granted, or the appointment of the guardian or trustee in this State was made, stating the facts by reason of which he claims said property, and asking said Court to direct that said property shall be delivered to him; and, upon his depositing in said Court a copy of the record of his appointment under the authority of the State in which his appointment was made, certified conformably to the Acts of Congress relating to the certification of judicial proceedings between the States, and furnishing satisfactory evidence that such guardians and trustees have power, by the laws of the State where he was appointed, to control the estate of their wards,

such Court of Probate may, in its discretion, direct such estate to be transferred to such guardian or trustee. Sect. 89. The executor, administrator, guardian, or trustee, shall transfer the personal estate of such heir, legatee or ward, to said guardian or trustee, according to the directions of said Court, and take his receipt for the same, and shall make return of his doings under oath, which, with said receipt, shall be recorded in the records of said Court, and said executor, administrator, guardian, or trustee, shall thereupon be discharged from all future liability for the property so transferred. Sect. 90. The Courts of Probate may direct guardians of minors residing in another State to pay over all, or a part, of the annual income of such minor's property, to be applied to the nurture or education of such minor, in the State where he or she resides." These sections of the Connecticut statutes are of comparatively recent enactment, and were obviously made in view of the disability of foreign executors, administrators, trustees, and guardians to maintain suits in this State without first having their appointments repeated here. They were intended to partially obviate the difficulty arising from this disability, by permitting a resort to the discretionary power conferred upon the Courts of Probate in behalf of foreign minors entitled to property. No doubt, the primary object of the statute was to deal with those cases where legatees, distributees and wards under age, derive their right to property from estates of persons deceased here, in the place of their domicil, and where administration of their estates must be had. But the language of the Act is broad enough to include property in the hands of a guardian or trustee and belonging to foreign minors, from whatever source derived. But the whole power in the premises is confided to the discretion of the Courts of Probate, to be exercised, if at all, in conformity with the provisions of the Act. Beyond this, the disability to maintain legal proceedings to recover the property still remains. Therefore, the plaintiff cannot, even if he is to be deemed clothed with the rights and powers of guardian of Homer Collins, recover in this action the avails of the piano and silver.

I have already shown, that the trust fund, the fruit of the residuary clause in the will, cannot be recovered in this action. Nor can it be recovered in equity by the plaintiff, unless he shall first be appointed, by the proper tribunal, trustee under the will, and be clothed with the power and responsibility of administering the whole trust. This trust cannot be split up and confided to different hands, nor can the whole fund be committed to a trustee who is empowered to act only for one of the *cestui que trusts*, leaving the rights of others in abeyance, and to an uncertain fate. It follows, from these views, that judgment in this suit must be rendered for the defendant.

If this were an ordinary case, I should not feel called upon to extend this discussion further; but there are several very interesting questions which naturally arise out of the facts, upon which I shall venture to make some suggestions.

It is alleged in the pleadings, and was insisted on in the argument, that the trustee in this case, appointed by the Court in New York, whatever might be the powers conferred upon him by such appointment in his own State, cannot, *virtute officii*, maintain a suit beyond the jurisdiction of that State. No direct authority on this point was cited at bar, and, after a somewhat extensive and diligent search, I have been unable to find any case in which such a question is discussed in relation to foreign trustees. But I apprehend, that, where the legal title of the trustee is created by the owner of the property, it would be respected, and the right of the trustee to enforce it be recognized everywhere. It would not be deemed material that the legal title was encumbered with a trust. The *jus disponendi* would be acknowledged and effect given to it, though, of course, any requirement of the local law as to formalities must be observed. Thus, if the title of the trustee is created by will, the will must be proved in the State where the suit is brought, according to the local law, to give effect to any title under it. So, if the legal title be by deed, the deed must be proved according to the local law. In this regard, the legal title of a trustee does not differ from any other

legal title, and he can everywhere enforce that title by legal proceedings, the same as any other owner. But, if the title is not derived from the *jus disponendi* of the owner, but solely from some act of the law, the effect of that act is confined to the territorial jurisdiction over which the law extends. This is the principle which has governed the cases of executors, administrators, and guardians, and I see no reason why it should not prevail in regard to trustees appointed by local law. As the trustee, in such a case, derives his title, not from the *jus disponendi* of the owner, but from the law of the State under which he is appointed, this title, as well as the right to enforce it by legal remedies, must cease to operate when he enters a foreign jurisdiction. Whenever he seeks to exercise his powers in another State than that under whose laws he was appointed, he must first have his appointment repeated by the local tribunal having jurisdiction over the appointment of trustees.

Now, as already intimated, had the present plaintiff been named in the will as trustee, he would have received the title to this estate from the *jus disponendi* of the owner, and this title would have enabled him to sue in this State, on compliance with the formalities required by its laws. These formalities are, the probate of the will in this State, and a bond for the due performance of the duty imposed by the will, so far as the property in this State is concerned. But the plaintiff received his appointment from the Supreme Court of New York. Still, the character of the title he took, (assuming now that the latter Court had jurisdiction, and that the appointment was that of a full trustee,) and the character of the trust with which it is encumbered, depend wholly on the will by which the trust was created. No Court, either of law or equity, could properly proceed a step in aid of the trustee, until the will had been produced and probated here. Judge Redfield, in his Treatise on *The Law of Wills*, (vol. 1, p. 401,) remarks: "In those American States where the probate of wills is conclusive, both of real and personal estate, the Courts of equity will not assume jurisdiction to compel the

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performance of a trust arising under a will proved in another State, but of which there has been no probate, or its equivalent, by filing a copy of the original probate in the State where the trust is claimed to be enforced, and into which State the funds belonging to the estate have been removed by the personal representatives. Such probate and administration is entirely local, and the personal representative appointed in one State, or his authority, cannot be recognized in any other State." This doctrine is supported by the cases of *Campbell v. Sheldon*, (13 *Pick.*, 8,) and *Campbell v. Wallace*, (10 *Gray*, 162,) and, although reference is made in them to the statute of Massachusetts, the general principle is not dependent upon those statutes.

It would seem, then, that a trustee under this will, whether named in the will, or appointed by the tribunal to which jurisdiction belongs, must, before he can maintain a suit in this State, prove the will in that probate district where the fund is in the hands of the defendant. Undoubtedly, the judge of the Probate Court would be authorized to accept, as proof of the due execution and validity of the will, an exemplified copy of the same, with the foreign probate thereof in Illinois, the domicil of the testator. Indeed, the production of the will, with the proceedings and decree of the foreign Court admitting the same to probate, would seem to exclude all other proof, and to require that auxiliary probate here should follow as of course. (*Enohin v. Wylie*, 10 *House of Lords Cases*, 1.)

It is hardly necessary to add, that the statutes of Connecticut authorize the probate of foreign wills in this State. This will has not been probated in Connecticut, nor is there any proof before this Court that it has ever been probated in New York. An exemplified copy of the probate in Illinois is produced, but this would not aid this Court, as it has no probate jurisdiction, and no means whatever to give effect to the will in this State. That must be done by the probate tribunals of the State. I do not overlook the fact, that this fund has been brought into this State since the settlement of the

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estate; but that is not material. The fund is here, and it is encumbered with a trust. The fund and the trust are derived from the will, and the trustee must claim under that instrument, in addition to the authority conferred upon him by his appointment by the Supreme Court of New York. He must, therefore, probate the will in this State, before he can enforce the title under this trust here. He must also be appointed in proper form, and by the proper tribunals, both in New York and in this State. The proper form undoubtedly is an appointment as trustee under the will, to execute the entire trust, with a bond holding him responsible for the interest of all persons who have any rights, contingent or otherwise, under the will.

Which is the proper tribunal to make the primary appointment of the trustee, is not so clear. The trust was created by a will executed at the domicil of the testatrix, in Illinois, where her death took place, her will was probated, and her estate settled. But neither the fund, nor the primary *cestui que trust*, nor any other party interested in the same, resides in that State. The primary *cestui que trust*, Homer Collins, has his domicil in New York. But there is no fund there, nor, so far as it appears in the proof, has this will ever been probated there. Of course, that omission could be easily supplied, if need be, before other proceedings are instituted. The will being proved and made effective in New York, where the primary *cestui que trust* resides with his grandparents, his natural guardians and protectors, it would seem to pertain to that jurisdiction to appoint the trustee, and supervise the administration of the trust. Certainly, the trust could be more intelligently and economically administered by a trustee residing in the vicinity of the ward. It was undoubtedly the expectation of the testatrix that the fund would be held in New York, as the trustee whom she appointed resided there, as well as the *cestui que trust*. The fund, which is now temporarily in the hands of the defendant, should be returned to the domicil of Homer Collins. The only object I have had in view, in touching upon this

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point, has been to suggest the question as to which jurisdiction should primarily appoint the trustee. As I have already stated, inasmuch as the trustee is to obtain the fund from one jurisdiction, and hold and execute the trust in another, he must receive an appointment from both. It may, after all, not be important which Court first appoints him. The only material point is, that he should be first appointed and qualified in New York, before any Court sitting in Connecticut could properly direct the fund to be passed over to him. If it should be contended that Illinois, the domicil of the testatrix by whose will this trust was created, is the proper jurisdiction to appoint a successor, it may be replied, that both the beneficiaries and the fund are situated elsewhere. There is nothing but the will, and its original probate in that State, upon which its jurisdiction can act; and, as the fund was received by the deceased trustee under an appointment by the Court in New York, and was brought into that State by him, and from there into this State, perhaps his administrator would be estopped from denying the authority of that Court to appoint his successor. At all events, after a proper appointment there, the plaintiff can prove the will here, have his appointment repeated here, and then apply to the Court of Probate, under the statute of Connecticut already cited, or apply directly to this Court.

It is no more than just to the defendant to say, that he admits that his intestate received the property in question from Wadhams, the executor of the will, as trustee, and brought into this State the avails, which are now in the defendant's hands; and that, as administrator, he is ready and anxious to pay over whatever has come into his hands, after the account of his intestate, as trustee, shall have been properly adjusted. His only solicitude is to pay to the person properly authorized to receive, and in accordance with the law.

APPENDIX.

I.

[The following charge was delivered to the Grand Jury, on the 10th of May, 1869, in the Circuit Court of the United States for the Southern District of New York, by Judge BENEDICT.]

FRAUDS ON THE REVENUE.

Description of the manner in which frauds on the revenue are perpetrated, in obtaining from the Government the payment of moneys on drawbacks, on the exportation of goods which have paid internal revenue taxes.

Frauds in the warehouse department, commented upon.

The subject of giving and taking gratuities for the performance of official duties, referred to.

The duties of a Grand Jury, enforced.

GENTLEMEN OF THE GRAND JURY: It is proper for me, on this occasion, to explain to you the nature of the duty you are called upon to perform, to show you the importance, at the present time, of a careful and conscientious discharge of that duty, and to direct your attention to some provisions of law and some questions of fact which you will be required to consider. The character of the duty devolving on a Grand Jury in a Court of the United States, many of you doubtless understand. It is that of declaring what persons shall be held to answer in Court for violations of the laws of the United States. Your services are made necessary by reason of that provision of the Federal Constitution which declares, that no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. This provision, while it affords citizens protection against arbitrary power, carries with it a great responsibility; for, under this provision, it rests with the people, as represented by a Grand Jury, drawn from the mass of citizens by lot, to say who shall and who shall not be accused of crime in the Courts of the United States. You, therefore, represent the important community dwelling in the Southern District of New York, and, in behalf of that community, you are called on to say what laws of the United States have been disobeyed within the District; to inquire as to what frauds upon the revenue of the United States have been committed therein; to ascertain what violations of the laws of the United States which provide for the currency, which protect the Post Office, which guard the soldier and the sailor from imposition, which forbid smuggling, which punish bribery, perjury or conspiracy to defraud the Government, have been committed; to say whether any and what officers of the United States, having sworn to execute and enforce the laws of the United States, have themselves assisted or connived at the evasion of them. The importance of this

duty, which is obvious from a statement of it, will be more fully appreciated, if you consider the circumstances under which it is now to be discharged.

The war, which decided the question whether a government framed like ours had the ability to quell by force of arms a great rebellion, raised another question, which is now in process of solution, namely, whether such a government can surely provide for the payment of the interest upon a great debt. The interest upon the public debt must be obtained by taxation, and this taxation, under the most favorable circumstances, must be heavy. It will become odious and intolerable, if it is to be borne by the honest and well-disposed classes alone, and avoided by those willing to grow rich at the expense of their fellow citizens, through fraudulent evasions of the law. This latter class, numerous and powerful, both socially and politically, has, from the beginning, confronted the Government in its effort to collect the revenue. At first, the Government attempted to compel their obedience by seizure of their property, and large quantities of merchandise detected in the act of escaping taxation were forfeited and sold. But the attempt was a failure, the frauds increased both in number and in magnitude, and the Government was compelled to turn to its last resort—the criminal jurisdiction of its Courts. It is now, therefore, here and elsewhere engaged in the effort to check these frauds by means of criminal prosecutions—the indictment, trial, conviction and imprisonment of defrauders of the revenue. Inasmuch, then, as no man can be tried until accused by a Grand Jury, the Government and the community, of which the Government is but the representative, now turns to the Grand Juries of the land, and asks the indictment of every man, whether high or low, rich or poor, who is found to be engaged in fraudulent evasions of legal taxes. Time would fail me to describe to you the various forms which these frauds assume, but it is my duty to put you in possession of what I have understood to be the facts in regard to some transactions which must come before you, and to allude in general terms to others which your own inquiries will expose.

I begin with what have been designated the drawback cases. These cases have been the subject of examination in the adjoining District, and are transferred to this District because most of the transactions took place here. They are frauds perpetrated under cover of the provisions of a law which enables a person who has paid taxes upon manufactures which he afterwards exports, to receive back the taxes he has paid, upon proving the actual exportation of the goods. To obtain this drawback, a set of papers is necessary in every case, consisting first of an internal revenue collector's certificate, that the tax on the goods has been paid; second, a certificate of the Collector of Customs, that such goods appear on a ship's manifest, on file in the Custom-House, as actually exported; third, an affidavit by the shipper as to the identity of the goods upon the manifest and the goods upon the tax receipt; fourth, a certificate of an internal revenue collector, that a proper bond to secure the Government against any relanding of the goods has been filed with him. These papers must be certified to at the Custom-House and then go to the Department at Washington, to be examined there. If found correct, a check for the amount of tax, drawn to the order of the shipper, upon the Treasury, is returned. Numerous sets of such papers, representing sums of from \$800 to \$7,000 each, all false, no such goods having been exported, there being no such shipper and no such manifest

on file, the bonds being fraudulent, the signatures forgeries, and the affidavits perjuries, have, within a space of six months' time, passed through the Custom-House here and been certified, have then passed through the Department at Washington and been there approved, and corresponding checks have been drawn and paid, every one, or nearly every one, upon a forged endorsement, until the total probably exceeds the sum of \$700,000. The fraud which I am thus enabled to describe, because it has already been the subject of examination in the adjoining District, is not disputed, and the money is gone. It will be your duty to say who shall be accused before this Court as criminally responsible for the transaction. Some of the parties supposed to have been engaged in this affair are already under bail. One has been brought from Florida, for the arm of the Government is long. Others have escaped beyond the seas. It will be your duty, however, to indict all who appear to have been connected in the design, whether present or absent. In your examination of this case, you will have occasion to see with what looseness the public business is sometimes conducted, for it will appear that great numbers of bonds required by law have been accepted as good, without any identification of signatures or of persons, and without any inquiry as to the sufficiency or even existence of the sureties, the greater part being, in fact, executed in fictitious names or by persons entirely worthless. It will also appear that the genuine seal of an internal revenue collector can constantly appear upon certificates now claimed to be forged, and that part of the files of the collector's office, being bonds required by law, can be removed and taken to a neighboring city, by persons having no connection whatever with the Government, there be dealt with as unknown parties may desire, and then be returned without objection or remark. I have explained the features of this case to you fully, because you will be called on to act in regard to it, and not because it is to any very great extent exceptional.

If you extend your inquiries into other departments of the Custom-House, you will find that similar frauds have been there committed. You will find that, in the warehouse department, it has been possible for certain parties to withdraw dutiable goods without payment of any duty, until the loss from a single warehouse has equaled \$400,000, according to the estimate of an official. The parties who committed this fraud walk the streets to-day, well known, but unprosecuted and unpunished, unless the repayment of a part of their great gains is to be called punishment. Nor is the case to which I am now alluding, and which you will find fully disclosed upon the files of this Court, the only one of this class which has occurred, and with a similar result, if I am correctly informed. You may think proper to inquire into them all. Frauds like these are, of course, not to be accomplished without the connivance on the part of officials; and you will have occasion, no doubt, to consider what persons shall be accused before this Court, for giving or accepting bribes.

There is also an abuse at the Custom-House, proper to be spoken of in this connection, which, I notice by the public prints, is now attracting some attention, and of the evil effects of which the drawback cases will give you painful proof. I refer to the custom of giving and taking gratuities for the performance of official duties. Strengthen the hands of the Collector, gentlemen, in any effort to stop this steady flow. The law lies at your hands, and it reads thus, (*Act of March 3d, 1868, § 4, 12 U. S. Stat. at Large, 789 :*) "If any officer of the rev-

nue * * * * shall knowingly accept, from any person engaged in the importation of goods, wares or merchandise into the United States, or interested, as principal, clerk, or agent, in any such importation, or in the entry of any goods, wares or merchandise, any fee, gratuity or emolument whatsoever, such officer shall, on conviction thereof, be removed from office and shall be fined in any sum not exceeding five thousand dollars, or be imprisoned not exceeding two years, at the discretion of the Court." The 6th section of the same Act is as follows: "If any person who shall be engaged in the importation of goods, wares or merchandise into the United States, or who shall be interested, as principal, clerk, or agent, in the entry of any goods, wares or merchandise, shall at any time make, or offer to make, to any officer of the revenue, any gratuity or present of any money or other thing of value, such person shall, on conviction thereof, be fined in any sum not exceeding five thousand dollars, or be imprisoned not exceeding two years, at the discretion of the Court."

The market price of whiskey is still less than the first cost of manufacture, with the taxes added. From the tobacco trade honest dealers are fast being driven out. Much of the income tax goes uncollected. The fraudulent bond-maker still plies his busy trade. Men known to have grown rich by illegal means have escaped even the accusation of fraud, and flaunt their wealth before the public eye. Honest officials have been compelled to leave the service for want of due support in the performance of their duty, while other officers of the revenue who have remained and dared to endeavor to protect the Government have found the very Government they sought to serve turned against them and used with effect to accomplish their destruction and disgrace. In view of a demoralization such as these facts disclose, do you wonder that some men query whether the proper enforcement of revenue laws is possible for such a Government as ours, with such a civil service as it has hitherto had? These remarks will have failed of their intended effect, if they have not served to deepen your sense of the responsibility which rests upon you, and to strengthen your determination to discharge yourselves of that responsibility in such a manner as to satisfy the proper demands of the community in which you live. To enable you to do this, great powers are given you. No matter within the jurisdiction of the Court is exempt from your scrutiny. No man, of whatever degree, can refuse to obey your summons or decline to answer your proper interrogatories. No compromise of a Department can have effect to stay your hand. Within your extended sphere you are supreme. Use, then, these great powers freely, examine diligently and inquire widely, but accuse with all due care, mindful always, that the mere examination of a transaction in open Court, is often of great public benefit, but, also, mindful that such an examination is often, of itself, a great punishment. It is not your province to try the cases which you may consider. That duty devolves upon the Petit Jury and the Court; but you are diligently to inquire and true presentment make of every offence arising under the laws of the United States which shall be made to appear by reasonable *prima facie* proof. This duty I charge you to perform, and if to its performance you shall bring that patience, that intelligence and that good courage which the occasion demands, you will render an important service to your fellow-citizens, as well as to the Government which protects you and under which it is your good fortune to live.

II.

Rule of the Circuit Court of the United States for the Northern District of New York, adopted since the publication of the fifth volume of these Reports.

RULE 21.

JANUARY TERM, 1870.

It is hereby ordered, that so much of the General Rules of this Court as provides for the drawing of Grand or Petit Jurors from the County of Rensselaer, be, and the same is hereby repealed; and that hereafter all Grand Jurors, and all Petit Jurors, for the terms of this Court appointed to be held in the city of Albany, shall be drawn from the county of Albany, as is now provided in respect to the Grand and Petit Jurors, required to be drawn from the county of Albany, under existing General Rules.

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ADMIRALTY.

1. After an appeal has been duly taken from the decree of this Court to the Supreme Court, by the claimant, in an admiralty suit, *in rem*, this Court will not, on the application of the claimant, under the 12th Rule of the Supreme Court, order that a commission issue to examine witnesses who are named, so that their depositions may be made available to the claimant on the appeal, although he has prayed, in his petition of appeal, that the cause may be tried anew in the Supreme Court, as well upon the proceedings and evidence in the Courts below, as upon such further depositions and evidence as the claimant may present to the Supreme Court. *The Ocean Queen*, 24

2. The 12th Rule of the Supreme Court, explained. *id.*

3. Under that Rule, it is for the Supreme Court to decide, on a motion to be made to it, whether the evidence sought to be taken will be admissible in the case, before a commission can be issued by this Court. *id.*

4. Where, on a libel *in personam*, in the District Court, against a corporation, for a collision alleged to have been caused by a vessel owned by it, the libel was dismissed by that Court, on the ground that there was no such corporation, and that it did not own such vessel, and no testimony was put in in that Court as to the merits, by the respondents, and, on appeal by the libellants to this Court, such objections were removed by evidence, this Court, on reversing the decree, allowed both parties to take proofs on the merits, in this Court, with liberty to either party to amend his pleading. *Remington v. Atlantic Royal Mail Co.*, 153

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BANKRUPTCY.

1. Where a petition in involuntary bankruptcy, filed under § 39 of the bankruptcy Act of 1867, (14 U. S. Stat. at Large, 536,) alleges the act complained of to have been done by the debtor "in contemplation of bankruptcy," and also states facts showing the debtor to have been insolvent at the time such act was done, and the evidence, on the trial, shows that the debtor was thus insolvent, but did not intend to take the benefit of the Act, and such evidence is not objected to, and there can be no surprise to the debtor in allowing the petition to be amended *nunc pro tunc*, by averring that the act was done by the debtor "while insolvent or in contemplation of insolvency," the Court may properly allow such amendment to be made. *In re Craft*, 177

2. The words "in contemplation of

bankruptcy," in the Act, mean, in contemplation of committing what is made by the Act an act of bankruptcy. *id.*

3. A substantial amendment, *nunc pro tunc*, going to the whole foundation of a proceeding under the 39th section, cannot be allowed, as it would be a violation of the limitation prescribed by the section, as to the time within which the petition must be brought. *id.*

4. Where a creditor, to whom a debt was due by a copartnership composed of three persons, took, for a part of it, the note of the copartnership endorsed by one of the copartners, and, for other parts of it, severally, three notes, each made by one of the copartners, and endorsed by the two copartners other than its maker, and afterward the copartners were adjudged bankrupts, and the creditor proved his debts against the makers alone of the four notes: *Held*, that he was entitled to dividends, according to such proofs, out of the several estates, joint or separate, against which the proofs were made. *Mead v. National Bank of Fayetteville*, 180

5. The copartners, in respect to the notes made or endorsed by them individually, were accommodation makers or endorsers for the copartnership, which, as between the copartners, and in equity, was the principal debtor. *id.*

6. There is nothing in the 36th section of the bankruptcy Act of March 2d, 1867, (14 U. S. Stat. at Large, 534,) which, in terms, prohibits such creditor from proving his debts, and taking dividends, against the joint and separate estates of his debtors, in virtue of their joint and several liabilities respectively, he being a legal creditor of the individual copartners in respect to the notes bearing their individual names either as makers or endorsers. *id.*

7. It is the doctrine of the English Court of Chancery, that, in bankruptcy, a creditor who has knowingly taken both the copartnership and

- debtors for the same debt, must elect whether he will prove his debt against the joint estate or the separate estate of his debtors. *id.*
8. The English rule is, that the mere form of the security or evidence of indebtedness does not control in respect to the question whether the debt can be proved against the copartnership, or must be proved against the separate estate of a partner. *id.*
9. Whether the creditor in this case would, at his election, have a right to prove his whole debt against the copartnership estate alone, or would have a right to prove, upon the copartnership note, against the copartnership and the endorsers on that note, and, upon the other notes, against the several makers and endorsers thereof, *quere.* *id.*
10. The English rule of election, discussed. *id.*
11. Whether, in this case, the joint estate of the copartnership ought not to be deemed a debtor to the separate estates of the several copartners, to the extent of any payment to be made, on the debt due to the creditor, out of such separate estates, *quere.* *id.*
12. A judgment which, by § 33 of the bankruptcy Act of March 2d, 1867, (14 *U. S. Stat. at Large*, 533,) will not be discharged by a discharge, because it is a debt created by the fraud of the bankrupt, is not, when proved in bankruptcy, subject to the provisions of the first clause of § 21 of that Act, in regard to judgments on debts proved being deemed to be discharged. *In re Robinson*, 253
13. This Court refused to review an incidental question of practice in a bankruptcy proceeding in the District Court. *id.*
14. The 29th section of the bankruptcy Act of March 2d, 1867, (14 *U. S. Stat. at Large*, 531,) requires a bankrupt to apply for a discharge from his debts within one year from the had none, and the bank was carried adjudication of bankruptcy, only in cases where, by reason of no debts having been proved against him, or of no assets having come to the hands of his assignee, he can apply for a discharge within less than six months from such adjudication. *In re Greenfield*, 287
15. Where flour was sent by A. to B., to be sold on commission, and the proceeds were to be remitted to A., less the commission of B., and the flour was sold, but the proceeds were not remitted, and B. was adjudged a bankrupt by the District Court, and afterward was arrested in an action founded on the transaction, brought against him by A., in a State Court: *Held*, That the debt was one created by the defalcation of B. while acting in a fiduciary character, within the meaning of section 33 of the bankruptcy Act of March 2d, 1867, (14 *U. S. Stat. at Large*, 533,) and that B. was, therefore, liable to such arrest, notwithstanding the provision of section 26 of said Act. *In re Kimball*, 292
16. *Held*, also, that the question whether, in such case, B. could be discharged from arrest by the bankruptcy Court, depended upon the case presented on which the arrest was made. *id.*
17. Where an appeal, purporting to be taken to this Court, under the 8th section of the bankruptcy Act of March 2d, 1867, (14 *U. S. Stat. at Large*, 520,) by a supposed creditor, whose claim is rejected, from the decision of the District Court, is not claimed, nor any notice of it given to the clerk of the District Court, and to the assignee, within ten days after the entry of the decision appealed from, this Court will dismiss the appeal. *In re Kyler*, 514
18. M., a private banker under the general banking law of New York, not being allowed by law to establish another private bank, established a joint stock bank under that law, under an agreement that the stockholders other than himself were to have no real interest in the bank, and they the individual obligation of his

on under that arrangement. M. failed in business, and the bank failed, and a receiver of the bank was appointed by a State Court of New York. M. having been subsequently adjudged a bankrupt, his assignee in bankruptcy brought a suit in equity, in this Court, against the receiver, to compel a delivery of the assets of the bank to the assignee, for distribution in bankruptcy, as assets of M.: *Held*, that the relief could not be granted, and that the bill must be dismissed. *Goodrich v. Remington*, 515

19. As the question was one on which it was proper to ask the opinion of the Court, and as the assignee, in filing the bill, acted under the advice of eminent counsel, no costs were allowed to the defendants. *id.*

20. K. was adjudged a bankrupt. G., at that time, held a mortgage on some of K.'s property. Afterward G. commenced a suit in the State Court, for the foreclosure of the mortgage, making J., the assignee in bankruptcy of K., a defendant. J., on a petition to the District Court, alleging the invalidity of the mortgage, and praying that it might be decreed to be void, and that the mortgaged premises might be sold, and the proceeds be brought into Court, and that further proceedings in the foreclosure suit might be enjoined, obtained such injunction, and an order requiring G. to answer the petition: *Held*, that the District Court had jurisdiction in the case, under § 1 of the bankruptcy Act of March 2d, 1867, (14 U. S. Stat. at Large, 517.) *In re Kerosene Oil Co.*, 521

21. *Held*, also, that the proceeding by J. should have been by a formal bill in equity. *id.*

22. The petition of J. was directed to be amended, and to be filed as a bill in equity, and G. was ordered, on service of a copy of it on his attorney, to plead to or answer it, according to the rules and practice of the Court, and proceedings in the foreclosure suit were stayed. *id.*

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CARRIER.

1. Where A., a passenger on a railroad, delivered to a carrier a metallic check, which he had received for his trunk, as baggage, so that the carrier might obtain the trunk, and deliver it at the residence of A., and received from the carrier, at the time, a paper, on which the number of the check was endorsed, and which contained a printed notice, that the carrier would "not become liable for merchandise or jewelry contained in baggage received upon baggage checks, nor for loss by fire, nor for an amount exceeding one hundred dollars, upon any article, unless specially agreed for, in writing, on this check receipt, and the extra risk paid therefor," and a statement that the owner thereby agreed that the carrier should be liable only as above: *Held*, that A. was chargeable with actual notice of the contents of the paper. *Hopkins v. Westcott*, 64
2. *Held*, also, that, by such paper, the responsibility of the carrier was qualified, to the effect stated in the paper. *id.*
3. The language of such a paper must, where there is any doubt as to its meaning, be construed strictly against the carrier. *id.*
4. The words "any article," in such paper, do not mean a trunk, or piece of baggage, and its entire contents, in gross, but mean any article contained in the piece of baggage. *id.*

5. Manuscript books, the property of a student, and necessary to the prosecution of his studies, are to be regarded as baggage. *id.*
6. The owner of a steamboat, who undertakes to transport a passenger thereon, for hire, is bound to exercise the utmost vigilance and care in maintaining order and guarding such passenger against violence which may reasonably be anticipated, or naturally be expected to occur, in view of the number and character of other passengers on board. *Flint v. Norwich & New York Transp. Co.*, 158
7. His obligation, in such respect, is the same, even though such other passengers are soldiers, carried on compulsion. *id.*
8. The rule of damages, if the carrier is guilty of negligence, which causes a personal injury to the passenger, stated. *id.*
9. Where oil, in casks, was transported, on freight, from Boston to New York, by a steam propeller, and some of the oil was lost on the voyage, and, in a suit *in rem*, by the owner of the oil, against the vessel, to recover for the loss, it appeared that the vessel encountered, on the voyage, an unusually violent storm, which fully accounted for the damage, within an exception in the bill of lading: *Held*, That the onus was on the shipper, to establish carelessness or negligence on the part of the vessel, leading to the loss. *The Neptune*, 193
10. The main deck of a steam propeller, bulwarked entirely around and covered by the upper deck, and constructed especially for the purpose of carrying cargo, so that the cargo placed there is as completely protected from the weather and from storms as if it were in the hold, is a proper place in which to stow such cargo. *id.*
3. D'Almaine v. Boosey, (1 Younge & Collyer's Exch. R., 288.) *Daly v. Palmer*, 256
4. LeRoy v. Tatham, (22 Howard, 132.) *Poillon v. Schmidt*, 299
5. Newlin v. Insurance Co., (20 Penn. R., 312.) *Hernandez v. Sun Mutual Ins. Co.*, 317
6. Hernandez v. Sun Mutual Ins. Co., (*ante*, p. 317.) *Hernandez v. New York Mutual Ins. Co.*, 326
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See PRACTICE, 18.

CHARTER-PARTY.

1. Where, by a charter-party, the owner of a vessel agreed that she should proceed direct from the Tortugas, whither she was bound, to another port, to load under the charter, and, after arriving at the Tortugas, she was seized by the military authorities of Fort Jefferson, and compelled to go on two voyages to Key West, for cargoes of coal, which it was alleged was necessary to be used in condensing fresh water for the use of the post, and the seizure was against the protest of the master of the vessel, and without any fault on his part: *Held*, in a suit against the vessel, on the charter-party, to recover damages for its breach and for the delay, that the military authorities were justified in impressing the vessel. *The Onrust*, 538
2. If they had erred, and their error had been simply an error of judg-

CASES CITED AND EXAMINED,

1. Mann v. Pentz, (3 Comstock, 415.) *Winans v. McKean R. R. Co.*, 215
2. Dayton v. Borst, (31 N.Y. R., 435.) *id.*

ment, on the facts as they appeared to them, they would still be justified. *id.*

8. The word "direct," in the charter-party, means that the vessel is to take a direct course from the Tortugas to the loading port, without deviation or unreasonable delay, and not that she shall depart from the Tortugas immediately. *id.*

4. The duty to perform the agreement to proceed direct from the Tortugas to the loading port, was an obligation imposed by law. *id.*

5. A forcible detention will excuse from the performance of an obligation created by law. *id.*

6. The case of *Paradine v. Jane*, (*Alley's R.*, 27,) commented on. *id.*

7. The seizure of the vessel being justified, and her owner having been disabled from performing his contract without any fault on his part, the fact that he has a remedy over against the Government does not make him responsible to the charterer for the delay. *id.*

8. In this case, he is not responsible for such delay, even though the military authorities were trespassers in seizing and detaining the vessel. *id.*

CIRCUIT COURT.

1. In an action at law, the Circuit Court of the United States for the District of Connecticut is governed by the laws in force in Connecticut, when those laws relate to the substantial rights of the parties, and not to mere matters of practice. *Curtis v. Smith*, 537

See JURISDICTION, 1 to 8.
PRACTICE, 5, 6, 15, 16.
REMOVAL.

CLERK.

1. Under the Act of February 26th, 1853, (10 *U. S. Stat. at Large*, 166,) moneys paid by the clerk of a Dis-

trict Court, during his clerkship, for expenses incurred by him, as clerk, for board and lodging at hotels, while attending, as clerk, at terms of the Court held away from the place where he is required to keep his office, are not allowable to him as "necessary expenses of his office." *United States v. Gorham*, 530

COLLECTOR.

1. Under the 22d section of the Act of March 2d, 1799, (1 *U. S. Stat. at Large*, 644,) where the deputy of a collector of the customs acts for the collector, in cases of occasional and necessary absence and of sickness, the collector still acts, but acts by the deputy, and is entitled to all the perquisites and emoluments of the office; but, where the collector is disabled or dies, the duties and authorities vested in him devolve on the deputy, and the perquisites and emoluments which accrue to the office of collector, after such disability or death, do not belong to the collector, or to his estate. *Merriam v. Clinch*, 5

See DUTIES.

FORFEITURE, 1 to 4.

COLLISION.

1. The fact that the claimant, in a suit *in rem*, for a collision, by putting repairs on the libellant's vessel, before suit was brought, made her worth more than she was before the collision, furnishes no reason for refusing to the libellant a recovery for demurrage, for the time occupied in making such repairs. *The Santee*, 1

2. A contract by a steamer to tow a canal-boat, at the risk of the canal-boat, does not exempt the steamboat from liability for damages caused to the canal-boat by the negligence of those in charge of the steamboat. *The Syracuse*, 2

3. Where a steamboat, with thirty-five boats in tow, is endeavoring to pass around the Battery, at New York, from the North river into the East

river, she should, if the harbor is crowded with vessels at anchor, pass around Governor's Island, and come up into the East river through Buttermilk channel. *id.*

4. Where a schooner was beating, with a flood tide, through the channel between Blackwell's Island and the New York shore, and was on her starboard tack, on her way from the island to the New York shore, and a steamer behind her, going in the same direction, at a speed of eight knots an hour, blew a whistle, as a signal to the schooner to tack short, and not to run out her course, and to permit the steamer to pass between her and the New York shore, and the schooner ran out her course before she tacked, and a collision ensued, and there was room for the steamer to have passed to the east of the schooner, and, if the schooner had tacked short, there would have been danger of her colliding with another schooner: *Held*, that the schooner was right in running out her course, and that the steamer was in fault. *The Bridgeport*, 3

5. In a collision case, where it appears that, at the time of the collision, the night was dark and rainy, with a high wind, and hazy, and the sea was running high, it should not be lightly presumed that the hands on board of a vessel would be remiss in their duty, and strong proof should be required to the contrary, in order to charge fault. *The Heroine*, 188

6. Where, in such a case, several of the material witnesses were examined orally before the District Court, and that Court found that the vessel which was under obligation to avoid the other vessel, could have discovered her lights in time to avoid her, this Court, although there was much evidence the other way, and the point was not free from doubt and difficulty, affirmed the decree. *id.*

7. Fault imputed because of the want of vigilance in a lookout. *id.*

8. Where two vessels, under steam, were crossing, so as to involve risk of collision, and vessel No. 1, which had vessel No. 2 on her own starboard

side, apprehending danger, stopped and backed, until she had stern-way on in the water, and vessel No. 2, instead of keeping her course, changed it, so as to make a collision inevitable, and one occurred: *Held*, that vessel No. 2 was in fault, for violating the provisions of Articles 14 and 18 of the Act of April 29th, 1864, (13 *U. S. Stat. at Large*, 58,) and that, under the circumstances, the change of course by vessel No. 2 did not come within any of the qualifications in Article 19 of the same Act. *The Corsica*, 190

9. Where it is the duty of a steamer to avoid a sailing vessel, the onus is on the steamer to show, in case of a collision, that the sailing vessel did not keep her course, or to show some other fault on the part of the sailing vessel, that contributed to the collision. *The Western Metropolis*, 210

10. Where the change of course by the sailing vessel is made under impending danger and *in extremis*, the steamer is responsible for it. *id.*

11. The duty of a steamer, at night, not to approach too near to a sailing vessel, in meeting her, when there is room to give her a wide berth, enforced. *id.*

12. A steamboat was held in fault, in this case, for running at too high a rate of speed through a crowd of vessels, in the night time, the lights of such vessels being seen by her. *The Syracuse*, 238

13. Where a steamship came in from sea and anchored, in a thick fog, in the Hudson river, between the city of New York and Jersey City, about in the usual track of the ferry-boats running on a ferry between the two cities, and one of the ferry-boats, in one of her trips, passed under the stern of the steamship and saw her just as she was dropping her anchor, and, afterward, during the same fog, the same ferry-boat collided with the steamship so at anchor: *Held*, that the ferry-boat was in fault. *The D. S. Gregory*, 528

14. *Held*, also, that the steamship was

not in fault, in anchoring where she did. *id.*

COMMISSION.

See ADMIRALTY, 1 to 3.

COMMISSIONS.

See DUTIES, 2, 6, 7.

COMPROMISE.

See FORFEITURE, 12 to 14.

CONFLICT OF LAWS.

See CIRCUIT COURT.
TRUST, 6 to 8.

CONSIDERATION.

See CONTRACT, 1.

CONSUL.

See JURISDICTION, 4.

CONTRACT.

1. What is sufficient value, in letters patent for a machine for condensing and moulding peat into convenient blocks for fuel, to constitute a consideration to support a contract in reference to the use of machines made according to the patent, discussed. *Leavitt v. Connecticut Peat Co., 139*
2. What amounts to an acceptance of the fulfilment of conditional guaranties and promises contained in a contract, discussed. *id.*
3. Where H. made a written agreement with F., that, in case F. could recover certain bonds fraudulently obtained from H., he would pay \$3,000, and the police notified H. that the bonds had been recovered, and were subject to his order, and they did not pass through the hands of F.: *Held,*

in a suit brought by F. against H., to recover the \$3,000, that it was incumbent on F., in order to show that he recovered the bonds, within the meaning of the agreement, to show that the police recovered the bonds through information furnished by F., and that it was not enough for F. to show that he sent communications on the subject to the police before the bonds were recovered, it appearing that the police had received other communications on the subject, as well as one from H., before the bonds were recovered. *Franklin v. Heiser, 426*

See CHARTER-PARTY.
SURETY.
WAR.

COPYRIGHT.

1. What is meant by the provision in the copyright Act of August 18th, 1856, (11 *U. S. Stat. at Large, 138*), which confers on the author or proprietor of a copyrighted dramatic composition designed or suited for public representation, along with the sole right to print and publish it, the sole right to act, perform or represent it on a stage or public place, defined. *Daly v. Palmer, 256*
2. A written play, consisting of directions for its representation by action, without the use of spoken language by the characters, is a dramatic composition, within that Act. *id.*
3. The question of infringement of a copyrighted dramatic composition, considered. *id.*
4. The case of *D'Almaine v. Boosey*, (1 *Younge & Collyer's Exch. R., 288*), cited and applied. *id.*
5. Under the Act of 1856, the author of a copyrighted dramatic composition is entitled to be protected against piracy, in whole or in part, by representation. *id.*
6. Where all that was substantial and material in a scene of a copyrighted play, a great part of such scene being represented by actions and not

by spoken language, was used in the same order and sequence of events, and in a manner to convey the same sensations and impressions to those who saw it represented: *Held*, that there was an infringement. *id.*

7. The true test of piracy, in respect to a copyright, defined. *id.*

8. The sale of an infringing play to another, with a view to its public representation, makes the seller a participant in causing the play to be publicly represented. *id.*

CORPORATION.

1. Where the by-laws of a corporation required the endorsement of its secretary on a promissory note belonging to it, payable to its order, to pass its title to such note, an endorsement by its president was held not to pass the title, where the endorsee was chargeable with knowledge of the fact that the endorsement was not made by the authority of the corporation. *Leavitt v. Connecticut Peat Co.*, 189

2. Where a bill is filed, in this Court, against a corporation created by the State of Pennsylvania, by a judgment creditor thereof, for a sequestration of its property, rights, and franchises, and for the appointment of a receiver thereof, with power to collect from its stockholders the amount of their unpaid subscriptions, or sufficient thereof to satisfy such judgment, and for the payment therewith of such judgment, it is a sufficient statement, in such bill, of the amount and value of such unpaid subscriptions, to state that it has unpaid subscriptions to its stock much more than sufficient to pay such judgment. *Winans v. McKean R. R. Co.*, 215

3. The fact that such corporation has no property in this District, and no property any where, but the demands for such unpaid subscriptions, is no objection to the jurisdiction of this Court, and no defence to such suit. *id.*

4. The cases of *Mann v. Pentz*, (8 *Comstock*, 415,) and *Dayton v. Borst*, (81 *N. Y. R.*, 485,) considered. *id.*

5. The case of *Dayton v. Borst* maintains the right of a receiver of a corporation appointed under a judgment creditor's bill, to recover the balance unpaid upon subscriptions to the capital stock of such corporation, without any previous call for the payment of such subscriptions having been made by such corporation, and, as the latest exposition of the law of the State of New York on the subject, by its highest Court, is adopted by this Court. *id.*

See INJUNCTION, 1, 2.

PARTY, 8.

PATENT, 63, 64.

REMOVAL, 1, to 3.

SALVAGE, 2, 3.

COSTS.

1. Where real estate was sold at auction by a receiver, and the purchaser refused to complete the purchase, on account of an alleged defect of title, and the Court made an order directing him to perfect the purchase, and the receiver then gave notice of the withdrawal of such order, and consented that it should be held void: *Held*, that the purchaser was entitled to be paid by the receiver his legal expenses, including reasonable counsel fees, incurred and paid in searching and examining the title, and in resisting the proceedings to have the purchase perfected. *Drake v. Goodridge*, 531

See BANKRUPTCY, 19.

CLERK.

PATENT, 40.

WITNESS, 2.

COUNTERFEITING.

See CRIMES, 2.

CRIMES.

1. The neglect or failure of an officer of the Internal Revenue to perform a duty required of him by law, does not relieve another person, who has violated the law, from the consequences of such violation. *United States v. Devlin*, 71

2. The 12th section of the Act of June 30th, 1864, (13 *U. S. Stat. at Large*, 222,) does not cover a case of the possession of false or counterfeit plates, in the similitude of genuine plates of the currency of the United States, but applies only to genuine transferred plates made after the similitude of other plates. *United States v. Addatte*, 132

See DISTRICT-ATTORNEY.
EVIDENCE, 3.
INDICTMENT.
JUROR.
PRACTICE, 5, 6, 19, 20.
TRIAL.

CUSTOM.

See SALE, 8, 4.

D.

DAMAGES.

1. The plaintiff, in an action at law for the infringement of letters patent, being entitled to recover, but not having proved any specific amount of damages, six cents damages were awarded to him. *Hall v. Bird*, 438

See CARRIER, 8.
COLLISION, 1, 2.
INSURANCE, 3.

DEBT.

See BANKRUPTCY, 12.

DECLARATION.

See PLEADING, 1 to 4.

DEMURRAGE.

See COLLISION, 1.

DEPUTY.

See COLLECTOR.

DISCHARGE.

See BANKRUPTCY, 12, 14.

DISCLAIMER.

See PATENT, 39, 40.

DISCOVERY.

See PLEADING, 6, 7.

DISTRICT-ATTORNEY.

- Whether the Attorney-General has power to give a direction to a District-Attorney, in respect to his official action in regard to an indictment found by a grand jury, and presented by such grand jury to the Court for its action thereon, *quere*. *United States v. Davis*, 464
- Such a direction, if given, is for the District-Attorney alone, and does not control the Court. *id.*

DISTRICT COURT.

See CLERK.

DRAWBACK.

See FRAUD, 1.

DUTIES.

- There is nothing in the Act of March 8d, 1851, (9 *U. S. Stat. at Large*, 629,) which justifies a collector of customs in requiring an importer of foreign merchandise to add to his invoice, as forming part of the dutiable value of such merchandise, charges for inland or coastwise transportation, whether by land or water, of such merchandise, from the place of its production or manufacture to another place, before it leaves its foreign port of shipment, for the United States. *Hutton v. Schell*, 48
- A charge for commissions, at "the usual rates," forms part of such duti-

- able value. This charge must be made, whether the importer has paid any commissions or not; and a charge for commissions at a rate higher than the usual rate, cannot be made, even though the importer has paid a higher rate. *id.*
3. The charge for "costs and charges" must include those actually paid, and nothing more, and it is not lawful to insert an arbitrary estimate. *id.*
4. Under the Act of March 3d, 1857, (11 *U. S. Stat. at Large*, 192,) a valid prospective protest against the payment of duties, made on a particular importation of merchandise, and expressing the intention of the importer that the protest shall apply to all future similar importations made by him, is valid as to subsequent importations of similar merchandise on which like duties are exacted. *id.*
5. A protest against paying duties on costs and charges, because the goods were invoiced "free on board," is insufficient unless the words "free on board" are found in the invoice. *id.*
6. A protest against paying duties on $2\frac{1}{2}$ per cent. commission, because no commission was paid, is insufficient, it being immaterial whether any commission was paid or not. *id.*
7. Under the provision of the 5th section of the said Act of March 3d, 1857, which declares that the decision of the collector, unless appealed from, shall be final and conclusive as to the liability of goods to duty or their exemption therefrom, it is not necessary that the importer should appeal from the decision of the collector requiring the addition to the invoice of illegal charges for inland freights, and commissions, and costs and charges, in order to prevent such decision from being final. *id.*
8. In a suit brought against a collector of customs, to recover back duties paid under protest, it is, under the Act of February 26th, 1845, (5 *U. S. Stat. at Large*, 727,) an indispensable item of proof, to be made by the plaintiff, on the trial of the suit, that such a protest as that Act requires was made. *Greenleaf v. Schell*, 225
9. Where the verdict in such a suit is, that, by consent of counsel, the jury find for the plaintiff, "for the amount, with interest, of the excess of duties paid under protest, on more than two per cent. commission on all importations specified in the bill of particulars in this cause, from the Continent of Europe, except Paris, the amount to be adjusted by the clerk of this Court or his deputy," and the clerk reports that, according to his adjustment, the plaintiffs are entitled to judgment for a sum named, the report cannot be excepted to on the ground that the duties are shown to have been paid by a certain firm, and that the plaintiffs did not prove before the referee that they composed that firm when the duties were paid, or that they alone paid the duties. *id.*
10. Even if such objection be not one which ought to have been taken by plea in abatement, as being an objection that some party who ought to have been joined as a plaintiff in the suit was not joined, the verdict cures any defect in that regard. *id.*
11. Such verdict must be considered as being also an order of reference made by the Court and entered in its minutes, and confines the action and duty of the referee to an arithmetical adjustment and computation of amounts, on the basis of computation prescribed in the verdict. *id.*
12. Under such verdict, the plaintiff is not required to prove before the referee that the duties were paid under protest. *id.*
13. Under the Act of March 3d, 1868, (12 *U. S. Stat. at Large*, 741,) the certificate therein provided for must be applied for in proper season. *Faber v. Barney*, 305
14. Where, in a suit against a collector of customs, to recover back duties alleged to have been illegally exacted by him, a judgment was recovered against the defendant, and no application for such a certificate was made

at the trial, nor until the expiration of nearly two years thereafter, and after a motion was noticed by the plaintiff for execution on the judgment, and such application was then made, on affidavits, before a judge who took no part in the trial: *Held*, that the application ought not to be granted. *id.*

15. Duties are not simply a charge upon merchandise, to be collected only by means of the custody of the property, but are a personal debt against the importer, which may be collected by a civil action. *United States v. George*, 406

16. Money in the registry of the Court, which is shown to have been demanded by the United States as duties, to have been due as such, and to have been paid as such, must be distributed by the Court as such. *id.*

17. "Angostura bitters," an article which, although of some value, as a remedy for some affections of the human body, is principally used in bar-rooms, as a flavoring extract for mixed drinks, is liable to a duty of 100 *per cent.*, under § 2 of the Act of June 30th, 1864, (18 *U. S. Stat. at Large*, 202,) as "spirituous liquors, not otherwise enumerated," and not to a duty of 50 *per cent.*, under § 5 of the Act of July 14th, 1862, (12 *Id.*, 546,) as a medicinal preparation. *Dallet v. Smythe*, 419

18. In this case, the Court, on the motion of the plaintiff, made in 1867, opened a judgment recovered in 1862, and then paid and satisfied of record, in order to permit errors in the assessment of damages in the case to be corrected, the suit being one against a collector of customs, to recover back moneys paid under protest, for duties, and the plaintiff not having been guilty of *laches*, and the errors being manifest. *Crookes v. Maxwell*, 468

See FORFEITURE, 10.

E.

ENDORSEMENT.

See CORPORATION, 1.

EQUITY.

1. Where H. individually, and T. individually, signed an agreement, whereby they agreed to account to D. for the proceeds of certain bills of lading, which were simultaneously delivered by D. to H., for himself and T., they being partners, and for any insurance money which should be received as such proceeds, until certain drafts accepted by D., for account of such partnership, against the goods covered by the bills of lading, should be provided for, the bills of lading having been held by D., a security for such acceptances, and the goods having been insured by such partnership, in the name of H., and having been lost at sea: *Held*, that T. and H. were liable, the two jointly, and each of them individually, to fulfil such agreement; and, T. and H. having become insolvent, and assigned their partnership, as well as their individual estates, for the benefit of their creditors, that D. had a right, at his election, to come in, under such assignment, as a creditor of T. and of H. individually, and to exhaust his remedy thereunder, against the separate estate of each of them, and afterward come in on the surplus of the joint estate of the two, after the payment of the joint debts of the two. *Drake v. Taylor*, 14

2. In 1857, B., being insolvent, made an assignment of his property to M., giving preferences among his creditors. Under creditors' bills, filed against B. and M., C. was appointed receiver of the property of B. Afterward, C. brought a suit, as such receiver, in a State Court, against B. and M., to recover the assigned property, and obtained a judgment, in 1858, adjudging the assignment to be fraudulent and void against the creditors of B. From that judgment, M. appealed, and the case was now pending on appeal. In 1868, B. was adjudged a bankrupt, and S. was appointed his assignee in bankruptcy. S. then, as such assignee, brought a suit in this Court, against M. and C., to compel C. to deliver up to S. the property in the hands of C., as receiver: *Held*, that the suit could not be maintained. *Sedgwick v. Menck*, 156

See BANKRUPTCY, 8 to 11, 18 to 22.

CORPORATION, 2 to 5.

COSTS.

INJUNCTION.

JURISDICTION, 5 to 8.

LIEN.

PARTY, 1, 2, 5 to 8.

PATENT, 7, 8, 20 to 28.

PLEADING, 5 to 11.

PRACTICE, 1, 7 to 14, 17, 18.

RECEIVER.

SURETY, 1.

TRUST.

EVIDENCE.

1. Where one, of two defendants, in a joint indictment against the two, is tried separately, the wife of the defendant who is not on trial is a competent witness for the defendant who is so tried separately. *United States v. Addatte*, 76
2. A record of a State Court, which sets forth proceedings warranted by the law of that State, is entitled to verity, although not formal in some particulars. *In re Robinson*, 253
3. Where, on the trial of an indictment, evidence to show that a witness for the prisoner has made statements inconsistent with his testimony, is admitted without the attention of the witness having first been called to such statements, the error is cured, if the witness, on being afterward called by the prisoner, denies such statements. *United States v. McHenry*, 503

See CONTRACT, 8.

DUTIES, 8.

INSURANCE, 11, 12.

PATENT, 2, 3.

PLEADING, 10.

PRACTICE, 3, 4, 10 to 14, 17.

TRIAL.

EXCEPTION.

See PRACTICE, 9 to 14.

EXTENSION.

See PATENT, 18, 19.

F.

FEES.

See CLERK.

WITNESS, 2.

FINE.

See INFORMER.

FORFEITURE.

1. The provisions of the Act of March 2d, 1867, (14 *U. S. Stat. at Large*, 546,) in regard to the distribution of the proceeds of fines, penalties, and forfeitures incurred under the provisions of the laws relating to the customs, commented on. *United States v. George*, 37
2. Those provisions apply to the proceeds of a forfeiture incurred under the 3d section of the Act of August 6th, 1846, (9 *U. S. Stat. at Large*, 54, 55.) *id*
3. The provisions of the Act of 1867, compared with those of the 89th, 90th, and 91st sections of the Act of March 2d, 1799, (1 *U. S. Stat. at Large*, 695 to 697,) in regard to the distribution of the proceeds of forfeitures for a breach of its provisions. *id*.
4. The proper practice, under the Act of 1867, is for the Court to pay to the collector the amount recovered, less the charges allowed, and for the collector to deduct duties and charges, where proper, and to pay the residue into the Treasury of the United States, to be distributed, under the direction of the Secretary of the Treasury, to the persons, and in the proportions, prescribed by the decree of the Court. *id*.
5. Preparatory to such decree, the Court, while in possession of the fund, will determine disputes between persons claiming to share in the fund, as informers. *id*.
6. Where the owner of personal property, mortgaged by him to another

person, remains in possession of it after giving the mortgage, and commits acts in respect to such property which work a forfeiture of it to the United States, under the 25th section of the Internal Revenue Act of March 2d, 1867, (14 *U. S. Stat. at Large*, 488,) it must be condemned, even though the mortgagee is not shown to have been concerned in such acts. *United States v. 7 Barrels, &c.*, 174.

7. Nor can the demand of the mortgagee be paid by the Court out of the proceeds of the property condemned. *id.*
8. The remedy of the mortgagee is, to apply to the Secretary of the Treasury for a remission of the forfeiture, as respects his demand. *id.*
9. The proper course of practice, where claims are made by the United States, by customs' officers, and by informers, to a fund in Court, paid in under the laws relating to customs, defined. *United States v. George*, 406
10. There is no statute of the United States which forfeits the value of dutiable goods which have been unlawfully removed from a bonded warehouse, without payment of the customs duties. *id.*
11. Customs' officers and informers are entitled to share only in fines, penalties, and forfeitures which are created by some law of the United States. *id.*
12. The authority to compromise, conferred on the Secretary of the Treasury by the 10th section of the Act of March 3d, 1863, (12 *U. S. Stat. at Large*, 740,) is not an authority to compromise criminal prosecutions. *id.*
13. The authority so conferred, defined and explained. *id.*
14. The Secretary of the Treasury has no power, under any act of Congress, to compromise criminal proceedings pending in Court. *id.*
15. The rights of customs' officers and informers are rights which should be carefully protected. *id.*
16. In a contest between informers, he

is the informer, who, with the intention of having his information acted upon, first gives information of a violation of law, which induces the prosecution, and contributes to the recovery of the fine, penalty, or forfeiture which is eventually recovered. *id.*

FRAUD.

1. Description of the manner in which frauds on the revenue are perpetrated, in obtaining from the Government the payment of moneys on drawbacks, on the exportation of goods which have paid internal revenue taxes. *Frauds on the Revenue*, 555
2. Frauds in the warehouse department, commented upon. *id.*

See BANKRUPTCY, 12.
OFFICER, 4.
PATENT, 10 to 13.

G.

GRAND JURY.

1. The duties of a Grand Jury, enforced. *Frauds on the Revenue*, 555

GUARDIAN.

1. It is the law of Connecticut, that a guardian must be constituted such by an appointment made in Connecticut, before he can bring an action in a Court in Connecticut, to recover property claimed by him as guardian. *Curtis v. Smith*, 537
2. The Statute of Connecticut, passed in 1854, (*General Statutes of Conn.*, 1866, 816, 817,) does not confer on a foreign guardian the right to sue in Connecticut, either at law or in equity. *id.*

I.

INDICTMENT.

1. In an indictment for a misdemeanor,

several offences may be joined in different counts; and, when that is done, the prosecution cannot be compelled to elect between the several counts.

United States v. Devlin, 71

2. Where, in an indictment for perjury, the averments as to the materiality of what it alleges to have been falsely sworn to are defective, the indictment is, nevertheless, good, if such materiality sufficiently appears upon its face. *United States v. McHenry*, 508

3. What are proper averments of materiality, in an indictment for perjury, considered. *id.*

See DISTRICT ATTORNEY.

EVIDENCE, 1, 8.

JUROR, 1, 2.

PRACTICE, 5, 6, 19, 20.

TRIAL.

INFORMER.

1. An assistant assessor of internal revenue, who, of his own motion, and by his own diligence, while in the discharge of his official duty as such assistant assessor, acquires information of facts on which to base a proceeding by indictment for a violation of the internal revenue law, and imparts such information to the district-attorney, with the intent that such proceeding shall be instituted upon such information, is, if such information is the first information so imparted, and if it leads to the indictment and conviction of the offender, entitled to share, as informer, in a fund in Court arising from a fine imposed by the Court, and paid on such conviction. *United States v. Chassell*, 421

See FORFEITURE, 1 to 5, 9, 11, 15, 16.

INFRINGEMENT.

See COPYRIGHT.

JURISDICTION, 7.

PARTY, 5.

PATENT, 20 to 28, 25, 28, 33, 35, 36, 42, 44, 58, 59, 63, 64, 69 to 71.

PLEADING, 5.

INJUNCTION.

1. An injunction against a corporation, if served on an officer thereof, or even if known by him to exist, binds him to obedience. *Hatch v. Chicago, Rock Island and Pacific Railroad Co.*, 105

2. A bill was filed against a corporation, by the holder of alleged shares of its capital stock, claiming that they had been illegally issued, the same having been issued by the conversion into stock of bonds issued by the corporation, and praying that their legality might be inquired into, and that, if they should be held to be illegal, the plaintiff might be repaid the amount paid by him for such alleged shares, and that the corporation might be enjoined, pending the suit, from disposing of so much of its property as would indemnify the plaintiff, and that a receiver of that amount might be appointed. It appearing that the moneys received by the corporation, on the issue of the bonds, had not been kept separate from its general funds, and could not be traced and identified: *Held*, that the injunction could not be granted, or the receiver appointed. *Whelpley v. Erie Railway Co.*, 271

3. An order for an injunction or a receiver will not be made in an improper case, even on the consent of both parties to the suit, more especially where the rights of third parties may be concerned. *id.*

4. This Court has jurisdiction of a suit in equity brought to restrain the building of a bridge across the Connecticut river, between Saybrook and Lyme, to be used for a railroad, although the construction of such bridge is claimed to be authorized by the Legislature of the State of Connecticut. *Baird v. Shore Line Railway Co.*, 270

5. The construction of such a bridge was enjoined until the final hearing of the cause. *id.*

6. By the Act of February 19th, 1869, (15 U. S. Stat. at Large, 278,) authority was given to the Shore Line Rail-

way Company to erect a drawbridge over the Connecticut river, although this Court had held, (*ante*, p. 276,) that such bridge would be an obstruction to navigation, and had enjoined its erection. *Baird v. Shore Line Railway Co.*, 461

7. The injunction was dissolved by the Court, because of the passage of such Act. *id.*

8. C. owned premises at the northeast corner of Fulton and Greenwich streets, in the city of New York, bounded, by deed to him, on the west, by the easterly side of Greenwich street, and, on the south, by the northerly line of Fulton street, but had no deed of any portion of the soil of Greenwich street. A corporation erected, in Greenwich street, in front of said premises, but outside of the lines thereof, one or more posts on which to lay an elevated railway. The corporation of the city of New York had theretofore exercised acts of ownership over the soil of Greenwich street, in front of said premises: *Held*, on a motion by C., on bill filed, for an injunction to restrain the construction of such railway, that C. had failed to make out that any property of his had been taken by the corporation. *Currier v. West Side Railway Co.*, 487

9. *Held*, also, that, as the Legislature of New York had authorized the construction of the railway, in the manner in which it was being constructed, this Court could not interfere, by injunction, with such construction, on the ground that it was a nuisance. *id.*

10. The Acts of the Legislature of New York of the 22d of April, 1867, (*Sess. Laws of 1867, chap. 489*), and the 3d of June, 1868, (*Sess. Laws of 1868, chap. 1855*), are not void, as containing a delegation of legislative authority. *id.*

11. Even if the railway were being constructed without authority of law, C., not owning in fee any of the land in Greenwich street, could not, in the absence of proof of special damage, maintain a suit to enjoin the construction of the railway. *id.*

See REMOVAL, 8. PATENT, 24 to 28, 43, 61 to 64.

INSPECTION.

See STEAMBOAT.

INSURANCE.

1. Where a policy of insurance, against loss or damage by fire to a vessel, contained a provision that the insurers should not be bound to pay until proper proofs of loss had been presented to them, and also a provision that no suit should be brought on the policy until after sixty days from the presentation of such proofs, and the insurers, after notice of a loss, inquired into the circumstances, and then, before the plaintiffs were bound to present proofs of loss, denied all liability under the policy, and refused to pay the loss, on the ground that the loss was the result of a marine, and not of a fire, peril, and no proofs of loss were presented, and a suit was brought on the policy before the expiration of sixty days from such refusal to pay: *Held*, that the insurers had thereby waived the proofs of loss, and also the benefit of the provision in regard to the sixty days. *Norwich and N. Y. Trans. Co. v. Western Mass. Ins. Co.*, 241

2. Where a steam vessel, insured against loss or damage by fire, was damaged by a collision, so that the water rose to her furnaces, and forced the fire out, and she was thereby set on fire, and, after burning for some time, she sank: *Held*, that the insurers were liable, on the policy, only for such loss as naturally and necessarily resulted from the fire. *id.*

3. The rule of damages, in such a case, stated. *id.*

4. In this case, which was a suit on a policy of marine insurance on boxes of lemons, a valuation of the lemons, by the policy, at so much per box, was held not to make the insurance an insurance on each box of the lemons, when it was otherwise a

single contract of insurance on the entire number of boxes of lemons named in the policy, and not an insurance against the loss of any portion of the boxes less than the whole. *Hernandez v. Sun Mutual Ins. Co.*, 317

5. The case of *Newlin v. Insurance Company*, (20 *Pennsylvania R.*, 312,) cited and approved. *id.*

6. All the words of a policy, the written ones and the printed ones, must be taken together, and, where there is a contradiction between them, the former must control. *id.*

7. The printed words of a policy, insuring against loss of the goods insured, "or any part thereof," commented on. *id.*

8. Those printed words do not control the printed words in the memorandum clause, "free from average, unless general." *id.*

9. The case of *Hernandez v. The Sun Mutual Ins. Co.*, (*ante*, p. 317,) affirmed. *Hernandez v. New York Mutual Ins. Co.*, 326

10. It makes no difference, on the question as to whether a policy insures against the loss of 6,000 boxes of lemons as a whole, or against the loss of each separate box, whether the policy, after naming the valuation of the lemons per box, does or does not name the total valuation, at that rate, of the 6,000 boxes. *id.*

11. Where an insurer sets up, as a defence to a policy of marine insurance, that the insured was advised of the loss of the subject insured before he procured the insurance, the insurer assumes the burden of proving such defence. *Clement v. Phenix Ins. Co.*, 481

12. If the attempt is made to prove such defence, by showing that such advice was conveyed by a letter, it must be shown not only that such letter was sent, but that it was received. *id.*

13. Knowledge of the loss, before in-

surance, possessed by a person who is not the agent of the insured for any purpose connected with procuring the insurance, is not notice to the insured. *id.*

See REMOVAL, 9.
WAR, 3 to 8.

INTERFERENCE.

See PATENT, 7 to 9, 52 to 55.

INTERNAL REVENUE.

See CRIMES, 1.
FRAUD, 1.
TRIAL, 1.

J.

JUDGMENT.

See BANKRUPTCY, 12.
DUTIES, 18.

JURISDICTION.

1. By reason of the provisions of the 6th section of the Act of April 3d, 1818, (8 *U. S. Stat. at Large*, 415,) the Circuit Court for the Southern District of New York has no original jurisdiction of a suit in equity, founded on letters patent, for infringements thereof which occurred within the Northern District of New York. *Hodge v. Hudson River Railroad Co.*, 85

2. Where a suit is brought in a State Court, and is duly removed into this Court, by the defendant, under the 12th section of the Act of September 24th, 1789, (1 *U. S. Stat. at Large*, 79,) the question of the jurisdiction of this Court is not dependent upon any of the provisions of the 11th section of that Act. *Winans v. McKean R. Co.*, 215

3. A defendant who voluntarily appears in a suit in this Court, waives his right to urge, as an objection to the jurisdiction of this Court, that he was not found, or served with process, in this District. *id.*

4. Where an action on contract was brought in this Court against the persons composing a firm, and the jurisdiction of the Court depended wholly on the fact that one of the defendants was a consul in the United States for a foreign power, and it was held that the firm was not liable, but that one of the defendants, other than the consul, was liable, with two other persons, who composed, with him, a former firm: *Held*, that this Court had no jurisdiction to give judgment against such defendant. *Bixby v. Janssen*, 815
 5. In order to give to this Court jurisdiction of an original suit on the ground of parties, it must be a suit between a citizen of the State of New York and a citizen of another State; and the necessary averments of citizenship, to confer jurisdiction, must appear on the face of the bill. *Merse-rolle v. Union Paper Collar Co.*, 356
 6. This Court has no authority to entertain a suit to declare a patent void, except in the cases provided for by the 16th section of the Act of July 4th, 1836, (5 *U. S. Stat. at Large*, 123,) and the 10th section of the Act of March 3d, 1839, (*Id.*, 354.) *id.*
 7. Where a bill in equity was filed in this Court to restrain the defendant from suing the plaintiff on a license under a patent, to recover tariffs thereunder, and to have it decreed that the consideration for the license had failed, because the patent was void for want of novelty, and to have the license cancelled: *Held*, That the rights of the defendant, by virtue of the license, arose out of the license, and not out of or under the patent, or the law under which it was granted, so as to give to this Court jurisdiction of such bill, under the 17th section of the Act of July 4th, 1836. *id.*
 8. A State Court has jurisdiction to decree a license under a patent to be void, and the fact that, in the investigation, that Court will be obliged to inquire, collaterally, into the novelty and validity of the patent as a consideration for the license, cannot deprive the State Court of jurisdiction, or confer it on this Court. *id.*
 9. A direct suit to repeal a patent cannot be brought in a State Court. *id.*

See BANKRUPTCY, 20.
CORPORATION, 3.
INJUNCTION, 4.
PARTY, 6, 7.
PRACTICE, 15.
- JUROR.**
1. No right to make a peremptory challenge to a juror exists, in the Circuit Court of the United States for the Eastern District of New York, on the part of a person on trial on an indictment for a misdemeanor. *United States v. Devlin*, 71
 2. The Act of July 20th, 1840, (5 *U. S. Stat. at Large*, 394,) does not confer such right. *id.*
 3. A challenge to a juror, for principal cause, is properly overruled, where it appears that the juror, although he has read about one-half of a column in a newspaper concerning the case, has never formed any fixed opinion, or made up his mind, respecting the guilt of the prisoner. *United States v. McHenry*, 503
 4. The decision upon a challenge for favor is not reviewable. *id.*

See GRAND JURY.
- L.**
- LICENSE.**
- See* JURISDICTION, 7, 8.
PATENT, 14 to 19, 26, 27.
- LIEN.**
1. An equitable lien cannot be enforced against money, or its representative, unless the money, or a specific substitute for it, can be identified. *Drake v. Taylor*, 14

See RECEIVER, 2.

M.

MANDAMUS.

See JURISDICTION, 16.

MASTER.

See PRACTICE, 9 to 14.

MISDEMEANOR.

See INDICTMENT, 1.
JUROR, 1, 2.

MORTGAGE.

See FORFEITURE, 6 to 8.

N.

NEGLIGENCE.

See CARRIER, 6 to 8.

NEW TRIAL.

See PRACTICE, 19, 20.

NOVELTY.

See PATENT, 4 to 6, 46, 48, 49,
52 to 55, 68.
PLEADING, 9, 10.

NUISANCE.

See INJUNCTION, 8 to 10.

O.

OFFICE.

See COLLECTOR.
OFFICER.

OFFICER.

1. No officer is entitled to the emolu-

ments of an office for any longer period than the period during which he holds the office. *Merriam v. Clinch*, 5

2. The provisions of the statutes of the United States on that subject, cited. *id.*

8. The right to the compensation attached to an office grows out of the discharge of the duties of such office, and its emoluments do not belong to a person who does not discharge its duties. *id.*

4. The subject of giving and taking gratuities for the performance of official duties, referred to. *Frauds on the Revenue*, 555

See INJUNCTION, 1.
PARTY, 8.

P.

PARTNERSHIP.

See BANKRUPTCY, 8 to 11.
EQUITY, 1.

PARTY.

1. In a suit in equity on a patent, it is proper to join, as plaintiff, with the owner of the legal title to the patent, the party who is immediately injured by the infringement, and who is equitably entitled to the fruits of the recovery in the suit. *Goodyear v. Allyn*, 83

2. It is not necessary that the bill should, in such case, be verified by the owner of the legal title, if it is verified by his co-plaintiff. *id.*

3. Where the officers of a corporation are made co-defendants with the corporation to a suit in equity, but no relief is prayed for as to any of such officers that is not prayed for in respect to the corporation, and no relief is prayed for against any such officer in his individual capacity, such officers are merely nominal parties to the suit. *Hatch v. Chicago*,

- Rock Island, and Pacific Railroad Co.*, 105
4. A person who has no interest, in a legal sense, in the subject-matter of a suit *in personam*, and who is not a party to it, cannot compel the plaintiff to make him a party. *Coleman v. Martin*, 119
 5. Whether, in a suit in equity, for an account for the infringement of a patent, all joint wrong-doers are necessary parties defendant, *quere*. *Goodyear v. Toby*, 130
 6. Where, in a suit in equity, brought by alien plaintiffs against citizens of New York, a person, not stated to be a citizen of New York, applied to be made a party to the suit: *Held*, that he could not be made a defendant, because that would oust the jurisdiction of the Court. *Drake v. Goodridge*, 151
 7. The Act of February 28th, 1839. (5 U. S. Stat. at Large, 321,) explained. *id.*
 8. No such practice is known, in equity, as making a person a defendant to a suit, on his own application, or as compelling a plaintiff to join, as co-plaintiff, a person not a party, on the application of such person. *id.*

See REMOVAL, 2, 3.

PASSENGER.

See CARRIER, 1 to 8.

PATENT.

1. Patents Generally. (1 to 3.)
2. Specification.
3. Novelty. (4 to 6.)
4. Interference. (7 to 9.)
5. Disclaimer.
6. Reissue. (10 to 13.)
7. Extension.
8. License. (14 to 19.)
9. Infringement. (20 to 23.)
10. Injunction. (24 to 28.)
11. Particular Patents.
 - (1.) Watt and Burgess'—Paper. (29, 30.)

- (2.) Mellier's—Paper. (31 to 34.)
- (3.) Conover's—Splitting Wood. (35.)
- (4.) Fuzzard and Hatch's—Wadding. (36.)
- (5.) Tuck's—Packing. (37 to 40.)
- (6.) Goodyear's—Hard India Rubber. (41 to 44.)
- (7.) Blake's—Breaking Stones. (45, 46.)
- (8.) Poillon's—Steam-Packing. (47 to 51.)
- (9.) Hagan's—Treating Ores: Mason's—Treating Ores. (52 to 55.)
- (10.) Doughty's—Skeleton Skirts. (56 to 59.)
- (11.) Jones'—Zinc White. (60 to 64.)
- (12.) Hall's — Stretching Chains. (65, 66.)
- (13.) Strong and Woodbury's—Whips. (67 to 71.)

1. Patents Generally.

1. In a suit for the infringement of a patent, the defence cannot be taken, that the patent was issued unintentionally, through a blunder of a subordinate in the Patent Office. *Doughty v. West*, 429
2. In an action for the infringement of a patent, the burden of showing, as a defence, that the patentee was a joint inventor, with some other person, of the thing patented, is on the defendant. *Ashcroft v. Cutter*, 511
8. Where the oath of such alleged joint inventor was contradicted by that of the patentee, and the patentee was corroborated by the circumstances that he was a draughtsman and had taken out patents for several inventions made by him, and that the other person was not a draughtsman, or a designer, or an inventor, and had neglected, although eight years had elapsed since he knew of the patent, to apply for a patent himself for the invention, or to assert his right in the premises in any legal form, this Court sustained the patent. *id.*

See JURISDICTION, 1, 6 to 9.

PARTY, 1, 2.

PRACTICE, 21.

2. *Specification.*

See 62.

3. *Novelty.*

4. Where a patent for an "improvement in paint-cans" claimed the "employment of a strengthening wire within the bead, as, and for the purpose herein shown and described," and the specification stated the point of the invention to be, placing a wire within a bead near the top edge of the body of the can, close under where the cover, when on, would come to, in order to strengthen the sides of the can, and prevent them from collapsing, by the great weight of the paint, when the can should be held by a bail: *Held*, that if a can, so constructed, was old, as a structure, it was of no consequence what it was designed to contain, provided it employed, within a bead located in substantially the same place, a wire, to strengthen the can against side pressure, and prevent its walls from collapsing by such side pressure. *Brown v. Hall*, 401

5. *Held*, also, that an ice-cream freezer, if so constructed, was an answer to the patent, on the ground of novelty, although it had no bail by which it could be held up or carried. *id.*

6. Where it is shown that a prior machine was constructed and used, and did not bodily disappear from view, but its existence and use were not made public, and the knowledge and use of it did not exist in a manner accessible to the public, and it had been substantially abandoned, and had substantially passed away from the memory of those who used it, until recalled to their memory by the success of a like machine, which was subsequently invented by another, the invention embodied in the latter machine cannot be regarded as having been previously known or used, within the meaning of the 6th section of the Act of July 4th, 1836, (5 *U. S. Stat. at Large*, 119.) *Hall v. Bird*, 438

See 46, 48, 49, 52 to 55, 68.
PLEADING, 9, 10.

4. *Interference.*

7. Exercise of the jurisdiction, under the 16th section of the Act of July 4th, 1836, (5 *U. S. Stat. at Large*, 128.) to declare void one of two interfering patents. *Gold and Silver Ore Separating Co., v. U. S. Disintegrating Ore Co.*, 307

8. What averments, in an answer to a bill filed to have a patent declared void, in the exercise of such jurisdiction, constitute an admission that the two patents which are claimed to interfere, cover and claim, in whole or in part, the same inventions. *id.*

9. Two patents interfere, within the meaning of the said 16th section, only when they claim, in whole or in part, the same invention. *id.*
See 52 to 55.

5. *Disclaimer.*

See 39, 40.

6. *Reissue.*

10. The legal status of reissued patents in their relation to the originals, and of questions of fraud growing out of imputed motives for obtaining reissues, and out of alleged corrupt or deceitful practices by inventors or owners of patents, in availing themselves of the privilege of surrender and reissue, considered. *Blake v. Stafford*, 195

11. The decision of the Commissioner of Patents, in accepting a surrender and granting a reissue, is final and conclusive, unless fraud or collusion is shown, or some irregularity is apparent on the face of the papers, or there is a plain repugnance between the specifications of the original and reissued patents. *id.*

12. The issue of fraud can be raised only by distinct and special allegations in the plea or answer. *id.*

13. What allegations, in a notice under the general issue, are insufficient to raise a question of fraud, considered. *id.*

7. *Extension.*

See 18, 19.

8. *License.*

14. A license granted under letters patent for a railroad car brake, to a railroad company, to construct and use the invention "on any and all cars belonging to said company, and to use the same improvement upon the entire length of their road, and upon all parts thereof, * * * for and during the term for which said letters patent are or may be granted," covers the use of brakes belonging to the company, attached to trucks and running gear belonging to them, even though the superstructures which are borne upon the trucks do not belong to the company. *Hodge v. Hudson River Railroad Co.*, 85
15. Such license does not convey the right to use the brake during an extended term of the patent, granted after the making of the license. *id.*
16. The only right which the company, as a lawful licensee, under the patent, for the first term, of the right to use the thing patented, has, under such extended term, is the right given to it by the 18th section of the Act of July 4th, 1836, (5 *U. S. Stat. at Large*, 125.) to continue to use until they are worn out, or as long as they can be repaired, such brakes as they had lawfully in use, under the license, when the first term of the patent expired. *id.*
17. A railroad company, in running its cars on the railroad of another company, under a permission to that effect, cannot be considered as operating such railroad, within the meaning of a license granting to the latter company, "and any and all other parties that may hereafter own or operate" such railroad, the right to construct and use a patented invention "on any and all cars now or hereafter owned by said company, or by parties that may hereafter own or operate" said railroad. *id.*
18. Where a license under a patent does not, on its face, cover the extended term of the patent, if it be claimed that, in fact, the parties to the license

had in view at the time an arrangement covering such extended term, such fact must be shown by evidence. *Hodge v. Hudson River Railroad Co.*, 165

19. The presumption of law in regard to every license under a patent is, that the parties deal in regard only to the term existing when the license is given, unless an express provision is inserted looking to a further interest; and, unless there be such a stipulation, showing that the parties contemplated an extension, the provisions of the license will be construed as relating to the then existing term only. *id.*

See 26, 27.

JURISDICTION, 7, 8.

9. *Infringement.*

20. Effect of an admission made in an answer, that the defendants had made "large profits" by the use of machinery alleged to infringe the plaintiff's patent, upon the question of the amount of nett profits derived from such infringement, on an accounting before a Master under a decree. *Troy Iron and Nail Factory v. Corning*, 328
21. Effect of letters written by the defendants to their customers, on the same question. *id.*
22. Consideration of the expenses and charges proper to be allowed to the defendants, in ascertaining such nett profits. *id.*
23. The true amount of the nett profit derived from using machinery, in infringement of a patent, to make articles which are sold, cannot be determined, without deducting from the value of the articles made and sold all the elements of cost in their production. *id.*

See 25, 28, 33, 35, 36, 42, 44, 46, 58, 59, 64, 69 to 71.

JURISDICTION, 1.

PARTY, 5.

PLEADING, 5.

10. *Injunction.*

24. Where, on a motion for an injunction to restrain the infringement of a patent, it was objected that the bill did not aver that the plaintiff marked, as required by section 13 of the Act of March 2d, 1861, (12 U. S. Stat. at Large, 249,) the articles made or vended under the patent: *Held*, that the objection was unavailing, because, (1.) It did not appear, by the bill, that the plaintiff had ever made or vended any articles under the patent, and the fact was not shown by the defendant; (2.) If that fact did appear, it would be for the defendant to show a failure by the plaintiff to mark, as required, the articles made or vended, and then the burden of proof would be on the plaintiff to show that, before suit brought, the defendant was duly notified that he was infringing the patent, and that he continued, after such notice, to make or vend the article patented; (3.) The penalty imposed by the statute, for a failure to mark patented articles, is only the taking away of the right to recover damages in the suit, and the right to an injunction, as a remedy, is not affected; (4.) It is questionable whether the statute applies to a suit in equity. *Goodyear v. Allyn*, 83
25. Where the validity of a patent is fully established, and its infringement is clear, the patentee has a right to protection by injunction, although great injury may thereby be caused to the infringer. *Hodge v. Hudson River Railroad Co.*, 165
26. Where the question of the right to the injunction depends only on the interpretation to be given to a license, it is the duty of the Court to interpret the license, on a motion for the injunction, and to grant or refuse the injunction, according to the result of such interpretation. *id.*
27. It appearing that the defendant was willing to pay a reasonable sum for the use of the patented invention, and that the plaintiff had a fixed license fee for its use, and exercised the franchise solely by licensing, for fees, the use of the invention, the Court held, that the defendant ought to be enjoined only in case he should elect to be enjoined in preference to paying a reasonable license fee for the use of the invention, to such extent as he might desire to use it during the unexpired term of the patent, such fee to be no greater than the regular fee, if any, established in like cases, and to be ascertained as of the time of the filing of the bill, by a reference to a master, on testimony to be produced before him. *id.*
28. Where, on a motion for a provisional injunction to restrain the infringement of letters patent for a floating grain dryer and elevator, the patent was not attacked for want of novelty, and the infringement was clear, but the patent had never been tried or established, at law or in equity, and no evidence was furnished as to its use, or as to the extent of such use, or as to acquiescence in the patent by the public, and the defendant showed that he had used his apparatus for about three years, and that no claim had been made against it under the patent until about six weeks previously, and the amount invested in the defendant's apparatus and business was large, and the business seemed to be precarious, and nothing appeared as to the defendant's responsibility, an injunction was withheld until the plaintiff should establish satisfactorily the point of acquiescence by the public, and show how the defendant's apparatus had been allowed to be used without interference, and leave was given to the plaintiff to renew his motion, on further papers, but the defendant was required to render sworn periodical accounts of the grain which should in future be treated by his apparatus, and to give satisfactory security, by bond, with sureties, to pay what might be recovered in the suit. *Sykes v. Manhattan Elevator Co.*, 496
See 48, 61 to 64.
11. *Particular Patents*
(1.) *Watt and Burgess'—Paper.*
29. The Watt and Burgess reissued patent, No. 1,448, for a pulp suitable for the manufacture of paper, made from wood, or other vegetable substances, by boiling the wood or other

substances in an alkali, under pressure, as described, is not a valid patent for a new product. *American Wood Paper Co. v. Fibre Disintegrating Co.*, 27

30. The process of producing such pulp from wood and other vegetable substances, covered by the Watt and Burgess reissued patent, No. 1,449, was not invented by them prior to the issue of the original patent. *id.*

(2.) *Mellier's—Paper.*

31. The process covered by the Mellier patent, granted August 7th, 1857, of disintegrating vegetable matter, for the purpose of producing pure cellulose, fit for the manufacture of paper, was first invented by Mellier. *American Wood Paper Co. v. Fibre Disintegrating Co.*, 27

32. The claim of the Mellier patent is not limited to the use of such process in treating straw alone, but extends, also, to the use of it in treating bamboo. *id.*

33. Such process consists in the use of a solution of pure caustic soda, under pressure, at a high temperature, to disintegrate the vegetable matter, and, if that process is used, the patent is infringed, even though the matter is partially disintegrated by a previous process. *id.*

34. The minimum pressure required by the Mellier patent is the pressure indicated by 55 pounds upon the steam gauge. *id.*

(3.) *Conover's—Splitting Wood.*

35. The first claim in the letters patent granted to Jacob A. Conover, May 13th, 1855, for a machine for splitting wood, namely, "a movable bed or carriage, for carrying and advancing the blocks of wood, in combination with the reciprocating cutters operating at right angles with the surface of the bed or carriage, substantially as and for the purpose specified," is infringed by the use of a machine for splitting wood, which contains every feature of the patented machine that is essential to the per-

formance of the same result in substantially the same way, although the reciprocating cutters in it do not operate at right angles with the surface of the bed or carriage. *Conover v. Dolrman*, 60

(4.) *Fuzzard and Hatch's—Wadding.*

36. The claim, in the reissued letters patent granted to William Fuzzard and James Hatch, April 5th, 1864, to "the employment or use of a heated metallic cylinder, B, or one having a metallic exterior or periphery, in combination with a heated pressure cylinder, C, one or more, and a polishing roller, G, or its equivalent, arranged as shown, for the purpose of surfacing and drying simultaneously, or at one operation, fibrous materials, as set forth," is not infringed by the use of a machine which employs a pressure roller that is not heated, and is not constructed so as to be heated, in any particular way. *Fuzzard Wadding Mfg. Co. v. Dickinson*, 80.

(5.) *Tuck's—Packing.*

37. In the letters patent, granted June 26th, 1855, to Joseph Tuck, for "improvements in packing for stuffing boxes," &c., the claim, in these words: "The forming of packing for pistons or stuffing boxes of steam engines, and for like purposes, out of saturated canvas, so cut as that the thread or warp shall run in a diagonal direction from the line or centre of the roll of packing, and rolled into form, either in connection with the india-rubber core, or other elastic material, or without, as herein set forth," is a claim for a new article of manufacture, and not for any special use thereof. *Tuck v. Bramhill*, 95

38. The claim to the forming of the roll, "either in connection with the india-rubber core, or other elastic material, or without," is equivalent to two separate claims, one for the forming of the roll with the core, and one for the forming of it without the core. *id.*

39. The roll without the core being old, but the roll with the core being new,

the patentee had a right, under the 7th section of the Act of March 8d, 1837, (5 *U. S. Stat. at Large*, 193,) to enter a disclaimer, disclaiming the forming of the roll without the core, and limiting his claim to the forming of the roll with the core. *id.*

40. Although such disclaimer is entered after the commencement of a suit on the patent by the patentee, he can, nevertheless, under the 7th and 9th sections of the said Act of 1837, recover in such suit, unless he unreasonably neglected or delayed to enter such disclaimer, but he cannot recover costs therein. *id.*

(6.) *Goodyear's—Hard India-Rubber.*

41. The reissued letters patent, Nos. 556 and 557, granted to Henry B. Goodyear, administrator of Nelson Goodyear, May 18th, 1858, for an "improvement in the manufacture of india-rubber," on the surrender of the original patent, granted to Nelson Goodyear, May 6th, 1851, are valid. *Goodyear v. Evans*, 121

42. It is an infringement of those reissued patents to use, for dental purposes, india-rubber prepared in accordance with letters patent granted to Edwin L. Simpson, October 16th, 1866, for an "improvement in dental rubber," and to vulcanize it, and then to use the product. *id.*

43. The Simpson patent is not an adverse patent to the Goodyear reissues, or one for the same invention covered by the Goodyear reissues, and does not confer upon the holder of it any *prima facie* right to use, without license, any thing covered by the Goodyear reissues, or warrant the withholding of an injunction to restrain a party working under the Simpson patent from infringing the Goodyear reissues. *id.*

44. The use of the process described in the patent granted to Edward L. Simpson, for preparing hard rubber or vulcanite, is an infringement of the Nelson Goodyear hard rubber patent. *Goodyear v. Rust*, 229

(7.) *Blake's—Breaking Stones.*

45. The reissued patent granted to Eli W. Blake, January 9th, 1866, for an "improvement in machinery for breaking stones," on the surrender of original letters patent granted to him, as inventor, June 15th, 1858, is valid. *Blake v. Stafford*, 195

46. The question of infringement and novelty, in this case, considered and determined. *id.*

(8.) *Poillon's—Steam-Packing.*

47. The letters patent granted to Peter Poillon, July 21st, 1857, for "means for rendering joints steam-tight," are valid. *Poillon v. Schmidt*, 299

48. The claim of that patent, to "the method, herein described, of causing steam to become a packing to itself, in steam cylinders or other parts of steam machinery by allowing the steam to act in one or more grooves, substantially as specified," does not claim the use of such grooved surfaces in themselves or in connection with air, instead of steam. *id.*

49. The patentee having discovered the fact that steam might be made self-packing, when introduced into small grooves in one of two contiguous surfaces not actually in contact with each other, his patent is not invalidated by the fact that air had previously been made self-packing in an air engine by the use of like grooves. *id.*

50. The claim of such patent is a claim to an art or process. *id.*

51. The case of *Le Roy v. Tatham*, (22 *Howard*, 182,) cited and applied. *id.*

(9.) *Hagan's—Treating Ores.*
Mason's—Treating Ores.

52. The first claim of the reissued patent No. 1,988, granted June 6th, 1865, to the Hagan Manufacturing Company and William E. Hagan, as assignees, on the invention of said Hagan, for an "improvement in furnaces for treating ores by superheated steam," the original patent having been granted to John B. Gale, as assignee of said Hagan, March 8th, 1864, and the first claim of the

patent granted January 8d, 1865, to C. V. De Forest, Amos Howes, and George E. Van Derburgh, as assignees, on the invention of Melchor B. Mason, for an "improved method of desulphurizing and oxydizing metallic ores," interfere with each other, in the sense of the said 16th section. *Gold and Silver Ore Separating Co. v. U. S. Disintegrating Ore Co.*, 307

53. The said claims examined and explained, in reference to such interference. *id.*

54. As between Hagan and Mason, Hagan was the first inventor of the process claimed by each of the two patents. *id.*

55. A decree made, adjudging the Mason patent void, so far as the process therein described for oxydizing ores employs superheated steam in the manner described in the Hagan patent. *id.*

(10.) *Doughty's—Skeleton Skirts.*

56. James Draper was the original and first inventor of the improvement claimed in letters patent, reissued to Samuel H. Doughty, August 1st, 1865, for an "improvement in skeleton skirts," the original patent having been granted to Doughty and Draper, on the invention of Draper, October 4th, 1859, and reissued to Doughty, and Draper, and James Brown, and William King, December 27th, 1859. *Doughty v. West*, 429

57. Draper made such invention before he applied for the original patent. *id.*

58. It is an infringement of the said reissued patent of 1865, to make and sell skeleton skirts, with the threads of filling left out in one or both of the two portions of tape which form the loop. *id.*

59. Skeleton skirts made in accordance with letters patent granted to Charles H. De Forest, January 6th, 1863, for an "improvement in hooped skirts," are an infringement on the said reissued patent of 1865. *id.*

(11.) *Jones'—Zinc White.*

60. The specification of the letters patent granted to Samuel T. Jones, February 24th, 1852, for an "improvement in the manufacture of zinc white," includes in its claim what is found in the English letters patent, No. 11,964, granted November 16th, 1847, specification sealed and enrolled May 16th, 1848, to William Edward Newton, for "improvements in the mode or modes of manufacturing or preparing certain matters to be employed as pigments." *Jones v. Osgood*, 435

61. Although the Jones patent was extended by the Commissioner of Patents, on the 23d of February, 1866, and the question of its extension was vigorously contested before the Patent Office, yet, as the existence of the Newton patent was not then adverted to, and there never had been any trial, at law or in equity, on the Jones patent, in which the full bearing of the Newton patent on the invention of Jones had been thoroughly examined, this Court refused to grant a provisional injunction restraining the infringement of the Jones patent. *id.*

62. The specification of the Jones patent does not properly distinguish, within the meaning of the 8th section of the Act of July 4th, 1836, (5 *U. S. Stat. at Large*, 119,) what was invented by Jones from what is found in the Newton patent. *id.*

63. The defendants being three individuals, and the infringement committed by them having arisen solely out of their connection with a New Jersey corporation, and only one, O., of the three defendants being interested in the management of the corporation, at the time the motion for a provisional injunction was made, and no infringement having been committed out of New Jersey, where the manufactory of the corporation was situated, and O.'s only concern with the infringement being as a director of the corporation, and he being only one of several directors, and it not appearing that he could control the use, or direct the disuse, by the cor-

poration, of the infringing apparatus, the motion was denied. *id.*

64. Whether, even if a majority of the directors of the corporation were parties defendant to the suit, the suit ought not to have been brought in New Jersey, where the corporation was located, and carried on its business, *quere.* *id.*

(12.) *Hall's—Stretching Chains.*

65. The object to be attained by the use of the machine described in letters patent granted to Charles Hall, August 30th, 1864, for an "improved machine for stretching chains," explained. *Hall v. Bird,* 438

66. The first claim of the Hall patent claims the use of tongs or clamps which have a provision for grasping firmly the link or links to be stretched in the chain, without injuring other links; and any prior machine, to be an answer to such first claim, must be shown to have contained tongs or clamps having such provision. *id.*

(13.) *Strong and Woodbury's—Whips.*

67. The invention covered by letters patent granted to Henry A. Strong and Edmund F. Woodbury, December 18th, 1866, for an "improvement in whips," on the invention of Woodbury, is a patentable invention. *Strong v. Noble,* 477

68. Although a tubular knit fabric was old, and although a whip was old, and although the idea of covering a whip and a whip-handle with something was old, the application, in the manner shown in that patent, of such a knit fabric to the covering of a whip, to produce a whip or a whip-handle covered with such a fabric, substantially as described in that patent, was not merely applying such knit fabric to a new use, in the sense in which, in the law of patents, the mere application of an old article to a new use is held not to be the subject of a patent. *id.*

69. Where a fabric is knit, by machinery, in flat strips, of the proper width

to form a tube of the required diameter, and projecting loops are then produced on each edge of the strip, and those loops are then interlooped with each other, by a crochet-needle, by hand, forming the same stitches as in the rest of the fabric, and making it impossible to tell where the union was effected, or that the fabric was not knit wholly by machinery, the resulting fabric is a fabric brought into a tubular form wholly by knitting. *id.*

70. Such fabric is substantially the tubular knit fabric of the patent of Strong and Woodbury. *id.*

71. It is no infringement of that patent to make and sell whips covered in whole or in part by a covering made of threads of warp and weft interwoven. *id.*

PERJURY.

See INDICTMENT, 2, 3.
TRIAL, 2, 3.

PLEADING.

1. The proper form of a declaration, in an action of assumpsit, in this Court, commented on. *Myers v. Davis,* 77
2. A count in such a declaration, alleging a sale and delivery of property by a third party to the defendant, an agreement by the defendant to pay such third party so much money therefor, and an assignment of the claim of such third party to the plaintiff, but not alleging that the defendant ever undertook or promised the plaintiff to pay to him the whole or any part of the claim, is bad, on general demurrer. *id.*
3. A count in such a declaration, alleging a sale of property by the plaintiff and a third party to the defendant, for so much money, and an agreement by the defendant to pay the sum therefor, but not alleging that the promise was to pay at any specified time, or on demand or request, and alleging that the defendant had not paid any part thereof to the plain-

- tiff or to such third party, that such third party assigned his interest in the demand to the plaintiff, and that the defendant, in consideration of the premises, promised to pay such money to the plaintiff, but not alleging that the defendant promised the plaintiff, or that the promise was to pay at any particular time, or on demand or request, and not alleging any other consideration for the promise, or any request or refusal to pay, is bad, on general demurrer. *id.*
4. Another count in such a declaration, held bad, on general demurrer, and its defects pointed out. *id.*
5. To a bill against a single defendant, alleging the infringement of a patent, by sales by him of the patented article, a plea was filed alleging that the sales were not made by the defendant alone, but were made by him and another person named in the plea: *Held*, that the plea was bad, because it did not allege that such other person was yet living, and within the jurisdiction of the Court. *Goodyear v. Tobby*, 180
6. Where a bill, founded on the alleged infringement of a patent, contained no special allegation that a discovery was necessary, and had no special interrogatories annexed to it, but contained the usual general prayer for an answer on oath, and a prayer for an account of profits, and it was demurred to on the ground that the Court had no jurisdiction of the case made by the bill, because it did not pray for either a discovery or an injunction: *Held*, that, under the 93d Rule in Equity, the bill was a bill for a discovery and account, and that the demurrer must be overruled. *Perry v. Corning*, 184
7. The admission of the counsel for the plaintiff, on the argument of the demurrer, that a discovery was not necessary, and that he did not seek a discovery, disregarded. *id.*
8. Whether the bill could be sustained as a bill for an account alone, *quere.* *id.*
9. An answer, in a suit in equity, on a patent, ought, in order to raise the defence of a want of novelty in the patent, to specify the time, place and person, when, where, and by whom, the prior invention was made or known, with sufficient particularity to enable the plaintiff to know what he has to meet. *Brown v. Hall*, 401
10. Where the answer does not contain such specification, but only avers general want of novelty, and prior use and sale generally, and the defendant takes testimony before the examiner, to prove such want of novelty, without any objection being at the time interposed by the plaintiff, on the ground that the testimony is directed to a defence not raised by the answer, the plaintiff must be regarded as waiving such objection, and it is too late for him to raise it at the hearing of the cause. *id.*
11. In this case, the defendant was allowed to move to amend his answer, without costs, after the hearing, and before the decree, so as to set up the particulars of defence, on the ground of the want of novelty, disclosed in his proofs. *id.*
12. Where, in an action of debt on a bond, in the penalty of £20,000 sterling, British money, conditioned for the payment of £10,000 sterling, with interest, the declaration claimed that the defendant should render to the plaintiff the £20,000, and averred that that sum was equivalent to the sum of \$140,000, United States' money, and the defendant pleaded: (1.) That neither the £20,000 sterling, nor the £10,000 sterling, with interest, was equivalent to \$140,000, United States' money, and that the defendant was not indebted to the plaintiff in the last-named sum; and, (2.) That the defendant did not owe, on an open or running account, for the payment of which the bond was given as collateral security, as much as \$140,000: *Held*, on demurrer, that both of the pleas were bad. *Gurney v. Hoge*, 499
18. *Held*, also, that the plaintiff was entitled to judgment on the demurrer, and was, under the 26th section of the Act of September 24th, 1789, (1 U. S. Stat. at Large, 87,) entitled to

recover from the defendant so much of the sum named in the condition of the bond, as was, according to equity, due to the plaintiff, and that, on the request of either party, such sum must be assessed by a jury; otherwise, it might be assessed by the Court. *id.*

See CORPORATION, 2.
INDICTMENT, 2, 8.
JURISDICTION, 5.
PATENT, 8, 12, 13, 20 to 23.
PRACTICE, 1, 7, 8, 18.

PRACTICE.

1. Where, in a suit in equity, a plea to the bill is filed, unaccompanied by any certificate of counsel, or any affidavit of the party, as required by the 81st Equity Rule, and the plaintiff, instead of disregarding the plea, or moving to take it from the files, or setting it down for argument, files a demurrer to it, and the cause is then regularly brought to argument, on the question of the sufficiency of the plea, the want of the certificate and affidavit must be regarded as waived by the plaintiff. *Goodyear v. Toby*, 180
2. In this case, the Court ordered the originals of printed exhibits, on file as parts of a deposition, to be taken from the files for the purpose of being annexed to a commission, on condition that photographic *fac-similes* thereof should first be made and placed on file, in lieu of the originals, under the direction of the clerk. *Daly v. Maguire*, 137
3. The practice of taking down by questions and answers, and not by way of narrative, the testimony given *viva voce*, in open Court, in Admiralty suits, reprobated. *The Syracuse*, 238
4. Rules, on that subject, made by the Circuit and Districts Courts of this District. *id.*
5. The practice stated, in regard to certificates of division of opinion, in criminal cases tried in the Circuit Court, where the Court is held by two judges. *United States v. Fullerton*, 275
6. The probability that difficult and important questions of law will arise on the trial of an indictment in the Circuit Court, will not ordinarily justify the postponement of the trial, so as to await the holding of the Court by two judges, with a view to a certificate of division of opinion. *id.*
7. Under Rule 66 of the Rules in Equity prescribed by the Supreme Court, the answer of every defendant in a suit in equity, when sufficient, must be replied to, without reference to the state of the cause or of the pleadings in regard to any other defendant. *Coleman v. Martin*, 291
8. The practice as to enlarging the time for the plaintiff to take proofs, under such circumstances, stated. *id.*
9. An exception should always be taken on the spot to each ruling of a Master which a party intends to contest. It need not then be drawn up in form, but it should be taken, by giving notice to the Master, and it is his duty to note the fact in his minutes. *Troy Iron and Nail Factory v. Corning*, 328
10. Where a Master admits evidence that is objected to, and reserves the questions arising on the objection, and afterward omits to pass on the objection, or decides upon it in a manner claimed to be incorrect, the first opportunity should be taken to except to his omission or alleged error in such particular. *id.*
11. The serving of the draft report of the Master, and the filing of objections thereto, is such opportunity, and, if such objections do not embrace such exceptions, it is too late to take such exceptions by way of exception to the final report of the Master. *id.*
12. If it is proper to except at all to the final report of a Master, for rulings admitting or rejecting evidence, this can only be done where objections of the same kind have been made to the draft report. *id.*

13. It is somewhat doubtful, whether, strictly, any exceptions to the Master's rulings on the admission or rejection of evidence, can be properly embraced in exceptions to the Master's final report. *id.*
14. Reasons for applying the rule strictly in this case; and for overruling exceptions taken to the final report of the Master, in respect of rulings made by him as to the admission and rejection of evidence. *id.*
15. Where a Court of the United States has no jurisdiction of a case, it has no power to make any order in it except to dismiss it for want of jurisdiction. *Fisk v. Union Pacific R. R. Co.*, 362
16. This Court will not stay proceedings in a State Court which are null and void; and it is forbidden by the 5th section of the Act of March 2d, 1793, (1 *U. S. Stat. at Large*, 334, 335,) to stay valid proceedings in a State Court. *id.*
17. An objection to testimony, made on the taking of it before an examiner, must state the ground of the objection, or it is not a legal or valid objection. *Brown v. Hall*, 401
18. An objection that a bill in equity was filed under an agreement made between the plaintiffs and certain other parties, which is void for champerty, ought to be raised formally, by answer, and not by a motion to take the bill from the files. *Sperry v. Erie Railway Co.*, 425
19. Where the Court refused to allow a prisoner, indicted for perjury, to read, in opposition to the motion of the District Attorney to proceed with the trial of the indictment against him, a letter from the Attorney-General to the District-Attorney, directing the latter to allow the prisoner an opportunity to place himself beyond the jurisdiction of the Court, and also refused to allow the prisoner to show that he had not been afforded such opportunity, and the trial was proceeded with, and the prisoner was convicted: *Held*, on a motion in arrest of judgment and for a new trial, that no error was committed. *United States v. Davis*, 464
20. Where a prisoner, indicted for perjury, was put upon his trial, and was present, with his counsel, during the empanelling of the jury, and during a portion of the opening of the case to the jury by the District-Attorney, and was then removed from the courtroom, by order of the Court, to an adjoining room, with liberty of access for his counsel, because he persisted in interrupting the District-Attorney, in a loud voice, although admonished by the Court to refrain, and the opening by the District-Attorney proceeded and was concluded during the prisoner's absence, and the prisoner was present during the rest of the trial, and was convicted: *Held*, on a motion in arrest of judgment and for a new trial, that no error was committed. *id.*
21. Where a defendant, in a suit in equity for the infringement of a patent, is advised of a decree against him therein, for a perpetual injunction, made on final hearing, and pays in full an execution issued for the taxed costs awarded to the plaintiff by the decree, and neglects, for eleven months after making such payment, to move to open the decree to let in a defence, it is too late for him to do so. *Doubleday v. Sherman*, 513
- See ADMIRALTY.*
 BANKRUPTCY, 1, 3, 13, 17, 20, to 22.
 CIRCUIT COURT.
 DISTRICT ATTORNEY.
 DUTIES, 8 to 12, 14, 18.
 EVIDENCE, 3.
 FORFEITURE, 1 to 5, 9.
 INDICTMENT, 1.
 INJUNCTION, 3 to 5.
 JURISDICTION, 2, 3.
 PARTY, 1, 2, 4, 6 to 8.
 PATENT, 2, 3, 12, 13, 28.
 PLEADING, 10, 11, 13. .
 RECEIVER, 2.
 REMOVAL.
 WITNESS.
- PRINCIPAL.
- See SURETY.*

PROBABLE CAUSE.

See DUTIES, 13, 14.

PROMISSORY NOTE.

See CORPORATION, 1.

PROTEST.

See DUTIES, 4 to 6, 8 to 12.

R.

RAIL-ROAD.

See INJUNCTION, 8 to 11.

RECEIVER.

1. When a receiver, appointed by this Court, is vested with the title to, and possession of, real estate, as such receiver, his possession is the possession of this Court, and any attempt to disturb such possession by proceedings subsequently instituted in a State Court, or otherwise, without first obtaining the leave of this Court, is a contempt of this Court. *De Visser v. Blackstone*, 235
2. Where a receiver appointed by this Court brought a suit in equity, in this Court, against persons who claimed to have pre-existing liens on real estate, of which such receiver was in possession by virtue of his trust, to have the rights of such defendants, in respect of such liens, determined by this Court, and, if adjudicated in their favor, paid out of the proceeds of the sale of such real estate by the receiver, this Court made an interlocutory order requiring the defendants to release their liens, and setting apart, to be paid into this Court, out of the proceeds of the sale to be made of such real estate by the receiver, a sufficient sum to discharge such liens, with the costs of the suit, and ten *per cent.* in addition, to be held as a fund applicable to the payment of such liens, if they should be established by the decree

of this Court to be prior in right to the claims of the plaintiff. *id.*

See COSTA.

INJUNCTION, 2, 3.

RECORD.

See EVIDENCE, 2.

REISSUE.

See PATENT, 10 to 13.

REMOVAL.

1. A corporation created by a State other than the State of New York, does not, by reason of its having an office, and transacting material branches of its business, within the State of New York, or by force of the State statute of New York, of April 10th, 1855, (*Laws of 1855, chap. 279*), lose the privilege, which otherwise belongs to it, as a corporation created by another State, of having all its members regarded as citizens of that State, within the meaning of the Acts of Congress in regard to the removal of causes into the Circuit Courts of the United States. *Hatch v. Chicago, Rock Island and Pacific Railroad Co.*, 105
2. A suit brought in a State Court of New York, by a citizen of New York, against a corporation created by a State other than New York, and against a citizen of a State other than New York, and against other defendants who are citizens of New York, cannot be removed into a Circuit court of the United States in New York, under the 12th section of the Judiciary Act of September 24th, 1789, (1 *U. S. Stat. at Large*, 79,) unless the defendants who are citizens of New York are merely nominal parties to the suit. *id.*
3. A plaintiff cannot, by joining, as nominal defendants, with a corporation, persons who are citizens of the same State with the plaintiff, deprive the corporation of any right which it would otherwise have in respect to

- removing a cause into a Court of the United States. *id.*
4. When the proper steps to effect the removal of a cause under the said Act of 1789 have been taken, and evidence thereof is presented to the State Court, the right to have the removal made is perfected, and no action of the State Court can either confer the right or take it away. *id.*
 5. The discretion to be exercised by the State Court in passing on the question as to whether such proper steps have been taken, is a legal discretion. *id.*
 6. No order by the State Court for the removal of the cause is necessary. *id.*
 7. If the defendant does all that is necessary to secure a removal, he can, whether the State Court makes an order of removal or not, perfect the removal, by entering in the Federal Court, at the proper time, copies of the proper papers, and his appearance, and special bail, if necessary; and, when that is done, the cause will proceed in the Federal Court. *id.*
 8. When a case is removed under the said Act of 1789, any injunction issued before its removal, *ipso facto* falls. *id.*
 9. Where a suit at law was brought, in a State Court, on a policy of re-insurance, and, while it was pending, the plaintiff brought a suit in Equity, in the same Court, against the defendant, to reform the policy, for mistake, and to prohibit the defendant from setting up, in defence, certain specified matters, and the defendant removed the suit in Equity into this Court, under the 12th section of the Act of September 24th, 1789, (1 *U. S. Stat. at Large*, 79:) *Held*, that the suit in Equity was an original suit, and was properly removable under said section. *Charter Oak Fire Ins. Co. v. Star Ins. Co.*, 208
 10. The 12th section of the Judiciary Act of September 24th, 1789, (1 *U. S. Stat. at Large*, 79) and the Act of July 27th, 1868, (14 *id.* 306,) and the Act of March 2d, 1867, (*id.* 558,) are statutes where the right to remove a case from a State Court into a Court of the United States is made to depend upon citizenship or alienage. *Fisk v. Union Pacific R. R. Co.*, 362
 11. The Act of March 2d, 1833, (4 *U. S. Stat. at Large*, 632, 633,) and the Act of March 3d, 1863, (12 *id.* 755, 756,) and the Act of July 27th, 1868, (15 *id.* 226, 227,) are statutes where the right so to remove a case is made to depend upon subject-matter. *id.*
 12. The Act of July 27th, 1868, is constitutional. *id.*
 13. Under the Act of March 2d, 1833, and the Act of March 3d, 1863, and the Act of July 27th, 1868, the entire suit is removed if any part of it is removed. *id.*
 14. The 2d section of the Act of July 27th, 1868, construed, as to what suits are removable under it, and at whose instance, and what is the mode of removal. *id.*
 15. The right to remove a cause, under all the Acts of Congress providing for removals, is a right conferred directly by the Act of Congress, and is not dependent upon the volition, or action, or non-action of a State Court. *id.*
 16. No *mandamus* from a Court of the United States to a State Court is necessary to enforce affirmative action by a State Court, to allow a cause to be removed, in an ordinary case of the removal of a cause before judgment; and, therefore, a Court of the United States has no jurisdiction to issue such *mandamus*. *id.*
 17. Under the Act of July 27th, 1868, a petition for removal must be regarded as being filed in the State Court when it is presented to that Court with the proper surety; and, when the proper petition is so presented, with the proper surety, so that that Court acts upon the matter judicially, in any way whatever, whether that Court accepts the surety or not, unless it puts its refusal upon some valid defect in the petition, or some insufficiency in the surety, it loses jurisdiction of the cause *eo instanti*. *id.*

18. Where, in a petition for removal under the Act of July 27th, 1868, the defendants petitioning comply with the Act, by setting out that they have a defence in the suit, arising under the Constitution of the United States and the laws of the United States, that averment must, in the Court of the United States, be accepted as true, until it is disposed of on the trial of the case. *id.*

19. Where a suit is removed into this Court, under the Act of July 27th, 1868, as respects all the parties to it, and all the subject-matter involved in it, all further proceedings in it in the State Court are void; and, although the State Court may be proceeding further in it at the instance of a party to it, it is not necessary to the exercise of the jurisdiction of this Court, that it should make an order staying all proceedings in the suit, by such party, in the State Court, and, therefore, such order will not be made. *id.*

See JURISDICTION, 2.

REPAIRS.

See COLLISION, 1.

REVENUE.

See FRAUD.

S.

SALE.

1. On the facts of this case, a sale of wool was held not to be a sale by sample, with a warranty that the bulk of the wool should equal certain samples of it. *Kellogg v. Barnard, 279*
2. What the rule of *caveat emptor* is, stated. *id.*
3. A custom of the wool trade, which supplies, on a sale of wool in bales, a warranty against its being falsely packed, is valid. *id.*

4. Where such a custom exists, qualified by the condition that the seller must, within a reasonable time, be notified and furnished with the marks and numbers of the bales claimed to be falsely packed, the purchaser is entitled, on compliance with such condition, to recover from the seller the damages sustained by reason of false packing. *id.*

See COPYRIGHT, 8.

SALVAGE.

1. A cargo of cotton belonging to the United States, on transportation, on freight, under bills of lading, on board of a vessel, from Savannah, Georgia, to New York, is liable to contribute, in a suit *in rem* against vessel and cargo, toward compensation for salvage services rendered to the vessel and cargo. *The S. L. Davis, 138*
2. Where a corporation, having authority, by its charter, to own vessels to be employed in saving vessels wrecked or in distress, and to take all compensation and salvages which, by law and usage, enure to private persons, was employed by the owners of a vessel which had gone on shore in a fog, to relieve her from a situation of peril, and did so: *Held*, That compensation for the service ought to be allowed to the corporation on the principle of allowing a liberal compensation for the use of the apparatus furnished, and for the skill with which it was handled in the service performed, but not on the principles governing the rate of compensation in the case of a salvage service. *The Morning Star, 154*
3. In this case, the Court allowed what it regarded as a reasonable compensation for the work and labor performed and the materials used. *id.*
4. An allowance for salvage services, made in this case, by the District Court, depending upon the exercise of sound discretion, was not interfered with by this Court. *The Delaware, 527*
5. It was not error in the District Court

not to charge the cargo of a vessel, libelled for salvage, with a portion of the amount allowed for salvage, where no such point was taken in the answer, the owners of the vessel being responsible for her seaworthiness, and the disaster which made the salvage necessary having occurred through her unseaworthiness: *id.*

SECRETARY OF THE TREASURY.

See FORFEITURE, 12 to 14.

SHIPPING.

1. Where a vessel and her cargo were in the common peril of going down together in deep water, where the vessel was anchored, the bows of the vessel being cut through by ice, and the master of the vessel ran her ashore, with her cargo, in shallower water, and the vessel was injured by lying on an uneven bottom, when so stranded, and all of the cargo was saved, a part of it without being wet: *Held*, that the case was one of voluntary stranding, authorizing a general average among ship, freight, and cargo, of the loss and damage caused by the stranding. *Rathbone v. Fowler*, 294
2. Damage caused to the vessel by the swelling of linseed in her cargo, through its being wet by water, which came through the holes made in the vessel by the ice, and damage to the cargo by such water, must be regarded as damage from a peril of the sea, and, therefore, not to be allowed for in general average. *id.*
3. That the water which damaged the cargo entered through such holes after the master determined to strand the vessel, makes no difference. *id.*
4. In view of the terms of the average bond in this case, and of the usage of the port in like cases, it was proper, in adjusting the average, to take, as the contributory value of the freight, one-half of the gross freight agreed to be paid for the voyage on which the disaster occurred. *id.*

See COLLISION.

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STEAMBOAT.

1. A steam tug, employed in towing, on the Connecticut River, between its mouth and the city of Hartford, and exclusively within the limits of the

State of Connecticut, vessels engaged in commerce among the several States, such tug not being itself engaged otherwise in commerce, is not within the provisions of the 4th section of the Act of June 8th, 1864, (18 *U. S. Stat. at Large*, 120,) in regard to inspection. *The Farragut*, 207

See CARRIER, 6 to 8.
COLLISION, 2 to 4, 8 to 12.
INSURANCE, 2.

SUBPOENA.

See WITNESS.

SUIT.

See DUTIES, 8 to 12.
GUARDIAN.
JURISDICTION, 1.
PARTY, 1, 2.
REMOVAL.
TRUST, 4, 6, 8.

SURETY.

1. Equity will not hold a surety liable, when he is discharged at law. *Fielden v. Lahens*, 524
2. In the case of an obligation joint, and not joint and several, executed by a principal and a surety, and the death of the surety, the remedy at law is gone, as against the legal representatives of the surety. *id.*
3. No State statute, enacted after the making of such an obligation, can change the contract of the surety, to his prejudice. *id.*

T.

TOWAGE.

See COLLISION, 2, 3.
STEAMBOAT.

TRIAL.

1. On the trial of an indictment under the Internal Revenue law, for having carried on business without a license,

and without having paid a special tax, and for having failed to keep books required by law to be kept, the burden of proof is on the defendant to show that he had a license, and paid the special tax, and kept the books. *United States v. Devlin*, 71

2. On the trial of an indictment against a person who was an officer of the Internal Revenue, for perjury in swearing, on a criminal complaint made by him against another officer of the Internal Revenue, for taking a bribe, that he saw the bribe taken, it is not error to charge the jury that they may consider the circumstance, that it was not until some months after the time at which the prisoner said he saw the bribe given, that he made such criminal complaint. *United States v. McHenry*, 503

8. Where, in an indictment for perjury, containing two counts, the first count charges the prisoner with having sworn to a false story, in an affidavit presented to a committing magistrate, as a criminal complaint, and the second count charges him with having sworn to the same false story, and also to other false matters, on an examination held by the magistrate on the complaint, and, on the trial, the jury are instructed that a verdict against the prisoner on the second count will not be inconsistent with a finding in his favor on the first count, it is not error to say to the jury, that, if they find against the prisoner on the first count, a verdict will almost certainly follow on the second count, there being no contradictory evidence, and no failure of full proof as to the taking of the oath by the prisoner, on the examination before the magistrate. *id.*

See CIRCUIT COURT.
DISTRICT ATTORNEY.
EVIDENCE, 1, 8.
INDICTMENT, 1.
JUROR.
PATENT, 2, 8.
PRACTICE, 5, 6, 19, 20.

TRUST.

1. An unexecuted trust, created by a

will, for the use and benefit of H., and, in the event of his death, during his minority, for the use and absolute enjoyment of the heirs of N., is a unit, and cannot be separated into distinct trusts, nor can its administration properly be divided. *Curtis v. Smith*, 537

2. The trustee of such a trust must take the trust property encumbered with the whole trust. *id.*
3. It being one of the terms of such trust, that such portion of the estate as may be necessary shall be expended in the education and support of H., a Court of equity will not permit H. to be deprived of a proper allowance for maintenance and education, in order to enhance the contingent estate for the benefit of the heirs of N.; nor will it permit the property to be wasted on H., without regard to the contingent rights of the heirs of N. *id.*
4. The administrator of a deceased trustee of such trust is not liable, in this Court, to be sued in a suit at law by the successor of such deceased trustee, to recover the trust fund, but can be called to account for such fund only in a suit in equity. *id.*

A person who is not appointed trustee under such will, but is only empowered to carry into effect its trust, so far as relates to H., has no right to the custody of the trust fund. *id.*

Semble, that, where the legal title of a trustee is created by the owner of property, the right of the trustee to enforce it will be recognized every where; but, where such title is derived solely from some act of the law, the effect of that act is confined to the territorial jurisdiction over which the law extends. *id.*

Whenever a trustee of the latter description seeks to exercise his powers in another State than that under whose laws he was appointed, he must first have his appointment repeated by the local tribunal having jurisdiction over the appointment of trustees. *id.*

. A trustee of the former description,

where the trust is created by a will, must, whether he be appointed trustee by the will or otherwise, prove the will in the local jurisdiction where the trust fund is in the hands of a person from whom he seeks to recover it, before he can maintain a suit against such person therefor. *id.*

TRUSTEE.

See TRUST.

U.

UNITED STATES.

See SALVAGE, 1.

USAGE.

See SALE, 3, 4.

V.

VERDICT.

See DUTIES, 9 to 12.

VESSEL.

See CARRIER, 9, 10.
COLLISION.
SHIPPING.
STEAMBOAT.

W.

WAIVER.

See INSURANCE, 1.
JURISDICTION, 3.
PLEADINGS, 10.
PRACTICE, 7.

WAR.

1. A state of war, recognized as such by and between the belligerent parties, suspends all contracts in

existence between the citizens of the respective belligerents at the time the war commenced. *Semmes v. City Fire Ins. Co.*, 445

2. Upon the termination of the war, obligations contracted before its commencement, between the respective citizens, though the remedy for their recovery is suspended during the war, are revived. *id.*

3. Where a policy of insurance against fire was issued by C. in Connecticut, in August, 1860, to L., a resident of Mississippi, on a building in the latter State, and a total loss occurred in January, 1861, during the life of the policy, and the policy contained a condition that no suit should be sustainable on it unless brought within twelve months after a loss, and this suit was brought on it in October, 1866: *Held*, that the contract of insurance, with all its incidents, including said condition, and all rights of action under the policy, were suspended during the continuance of the war which commenced, after said loss, between the so-called Confederate States, of which Mississippi was one, and the United States. *id.*

4. In determining when the rights suspended by such war revived, recourse can only be had to the Government of the United States, as the war was a civil war, in which the so-called Confederate States were defeated, and their organization, as a *de facto* government, was politically annihilated. *id.*

5. The Courts of the United States, in ascertaining when such war ceased, must look exclusively to the action of the President, or Congress, or both. *id.*

6. The President had authority to issue his proclamation of June 18th, 1865, (13 *U. S. Stat. at Large*, 763,) removing the restrictions upon intercourse

with the States east of the Mississippi river which had been in rebellion. *id.*

7. By virtue of that proclamation, the said contract of insurance, though suspended during the war, revived on the 18th of June, 1865, and was, from that date, in full force, with the right to sue upon it. *id.*

8. This suit, not having been brought within the time limited by the policy, exclusive of the whole period of disability, was held not to be maintainable. *id.*

• WAREHOUSE.

See FRAUD, 2.

WARRANTY.

See SALE.

WILL.

See TRUST.

WITNESS.

1. A service of a subpoena on a witness, in a civil suit, by a private person, not the marshal or his deputy, is a proper and legal service of a subpoena issued by this Court. *Cummings v. Akron Cement Co.*, 509

2. A person who attends this Court as a witness, on the request of a party, without the actual service of a subpoena, is entitled to his fees, and such fees may be taxed against the defeated party, under the Act of February 26th, 1858, (10 *U. S. Stat. at Large*, 161.) *id.*

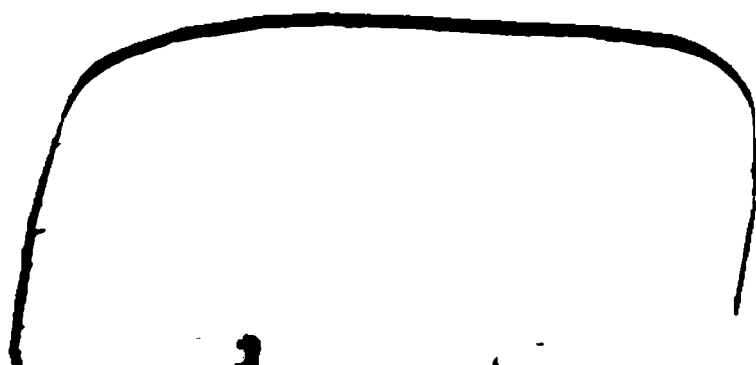
See EVIDENCE, 1.



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on the first count, a verdict there being no contrary showing on the taking of the oath of the jurate.

Where, in a indictment for it alleges to have been false, nevertheless, good, if such matter. What are proper averments considered.

(Before BENEDICT, J., Southern)

THIS was an indictment. J. After conviction, judgment, and for a new

Joseph Bell, (Ass
States.

Edward D. McC

BENEDICT, J. The pressed upon my attention, in support of the attention.

The first error supposed in overruling the case of Brown. Upon this point testimony of the jurate though he had read the paper concerning the opinion, or made up prisoner. The authority, not applicable to be said, upon the evidence have been allowed. favor is not reviewed 229 :) and, if it were candid and cautious